United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
JEROME J. LONDIN

75-1246

B
p/s

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1246

UNITED STATES OF AMERICA,

Appellee,

—v.—

FERGUS M. SLOAN, *et al.*,

Defendants-Appellants.

BRIEF FOR APPELLANT ANDERSON

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
10 East 40th Street
New York, New York 10016
Attorneys for Defendant-Appellant
Carl W. Anderson

JEROME J. LONDIN
KENNETH A. LAPATINE
Of Counsel

2

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Questions Presented 3

Statutes Involved 4

Statement of the Case 5

POINT I—

Having been convicted of conspiring to violate SEC rules of which he was concededly ignorant, Anderson may not be imprisoned under 15 U.S.C. §78q(a) 30

POINT II—

There was no evidence that Anderson conspired to file any false report with the SEC. The Court's instructions erroneously permitted a conviction on a conspiracy of silence by inference from his presence at a partners' meeting, where there was no mention of the SEC 36

POINT III—

On pre-trial motion and at trial the Court erroneously ignored Rule 8c-1, 17 C.F.R. 240-8c-1, holding that any hypothecation of customers' fully paid-for securities was illegal, and over objection admitted substantial evidence of Orvis' hypothecation in the spring of 1970 as probative of Anderson's wilfulness with respect to Form X-17A-5 in October 1969 48

PAGE

Point IV—

The Fund of Letters trade was erroneously submitted to the jury in the absence of any evidence that Anderson conspired to include it in Form X-17A-5 under "Balances in Customers Cash Accounts", after the prosecution exploited the transaction in order to link Anderson with Vesco 57

Point V—

The Due Process Clause was violated by the 5-year pre-indictment delay and the prosecution's wilful failure to call before the Grand Jury an attorney who directly contradicted the witness without whom it concededly had no case before the Grand Jury and at trial 67

Conclusion 83

Table of Authorities

Cases:

Direct Sales Co. v. *United States*, 319 U.S. 703 (1943) 47

Edgington v. *Fitzmaurice* (1885), 29 Ch. D. 459 78

Grunewald v. *United States*, 353 U.S. 391 (1957) 39

Ingram v. *United States*, 360 U.S. 672 (1959) 47

People v. *Dumas*, 51 Misc.2d 929, 274 N.Y.S.2d 764 (Sup. Ct. St. Law. Co. 1966) 83

PAGE

People v. *Lazar,* 51 Misc.2d 233, 272 N.Y.S.2d 338 (Sup. Ct. N.Y. Co. 1966) 83

People v. *Seward,* 51 Misc.2d 415, 273 N.Y.S.2d 306 (Co. Ct. Rock. Co. 1966) 83

People v. *Rosen,* 74 N.Y.S.2d 624 (Kings Co. Ct. 1947), not officially reported 83

People v. *Santoro,* 63 N.Y.S.2d 615 (Kings Co. Ct. 1946), not officially reported 83

Pereira v. *United States,* 347 U.S. 1 (1954) 47

S.E.C. v. *Manor Nursing Ctrs., Inc.,* 340 F. Supp. 913 (S.D N.Y. 1971), *aff'd* in part, *rev'd* in part, 458 F.2d 1082 (2d Cir. 1972) 56

United States v. *Borelli,* 336 F.2d 376 (2d Cir. 1964) 46

United States v. *Calandra,* 414 U.S. 338 (1974) 82

United States v. *Falcone,* 311 U.S. 205 (1940) 47

United States v. *Feinberg,* 383 F.2d 60 (2d Cir. 1967), *cert. den.* 389 U.S. 1044 (1968) 79

United States v. *Garguilo,* 310 F.2d 249 (2d Cir. 1962) 46

United States v. *Jacobson,* 325 F.2d 409 (2d Cir. 1963), *affirmed,* 380 U.S. 246 (1965) 83

United States v. *Lilley,* 291 F. Supp. 989 (S.D. Tex. 1968) 33, 34

United States v. *Marion,* 404 U.S. 307 (1972) 78, 79

United States v. *Natelli,* —— F.2d —— (2d Cir. 1975), decided July 28, 1975, Slip Op. p. 5191 .....57, 62, 66

United States v. *Peltz,* 433 F.2d 48 (2d Cir. 1970), *cert. den.,* 401 U.S. 955 (1971) 34

United States v. *Schwartz,* 464 F.2d 499 (2d Cir. 1972), *cert. den.,* 409 U.S. 1009 (1972) 35, 51, 79

United States v. *Simon,* 425 F.2d 796 (2d Cir. 1969), *cert. den.,* 397 U.S. 1006 (1970) 36

PAGE

United States v. *Silverman*, 248 F.2d 671 (2d Cir. 1957), *cert. den.*, 355 U.S. 942 (1958) 83
United States v. *Solomon*, 509 F.2d 863 (2d Cir. 1975) 31
United States v. *Stone*, 429 F.2d 138 (2d Cir. 1970) .. 82

Yates v. *United States*, 354 U.S. 298 (1957) 83

Constitution, Statutes, Rules and Regulations:

Fifth Amendment—Indictment Clause 79
Fifth Amendment—Due Process Clause 5, 67, 78, 79
18 U.S.C. §1 ....32, 33
18 U.S.C. §371 ....30, 32, 36, 47

Securities Act of 1933

§17(a), 15 U.S.C. §77q(a) 33

Securities Exchange Act of 1934

§8(c), 15 U.S.C. §78h(c) 35, 48, 49-50, 51
§9(a)(2), 15 U.S.C. §78i(a)(2) 33
§17(a), 15 U.S.C. §78q(a) 1, 3, 30, 31, 32, 33, 35, 36

§32(a), 15 U.S.C. §78ff(a) 1, 30, 31, 32, 33, 34, 35, 36

Rule 8c-1, 17 C.F.R. 240.8c-1 ....2, 4, 35, 48, 49, 50, 51, 54, 55

Rule 10b-5, 17 C.F.R. 240.10b-5 ....2, 33
Rules 17a-3, 4 and 5, 17 C.F.R. 240.17a-3, 4 and 5 ....1, 2, 30, 31, 32, 37, 48

Regulation T, 12 C.F.R. 220 ....2, 58, 62, 65

Miscellaneous:

II Loss, Securities Regulation (2d Ed.) 51
V Loss, Securities Regulation (1969 Supp.) 51

United States Court of Appeals

For the Second Circuit

Docket No. 75-1246

United States of America,

Appellee,

—v.—

Fergus M. Sloan, *et al.*,

Defendants-Appellants.

BRIEF FOR APPELLANT ANDERSON

Preliminary Statement

Carl W. Anderson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 7, 1975 after a four-week trial before Hon. Whitman Knapp and a jury. He was convicted of conspiring to violate 15 U.S.C. §§ 78q (a)—which authorizes the SEC to promulgate record-making rules—and 78ff—the penalty provision for the 1934 Act and its rules—and 17 C.F.R. 240.17a-3, 4 and 5—rules of the 1934 Act promulgated by the SEC pursuant to the authority of Section 78q(a). Judge Knapp imposed a jail sentence of a year and a day (App. 259a).

Indictment 74 CR. 859 was filed on September 10, 1974, almost contemporaneously with the Assistant U.S. Attorney's resignation, after most of its allegations were barred by the statute of limitations. Count 1 (which ultimately

went to the jury in reduced form) charged a conspiracy by Orvis Brothers' executive committee to:

a) Hypothecate customers' securities in 1969 and 1970 in violation of Rule 8c-1 (17 C.F.R. 240.8c-1), as set forth in Count 9—dismissed at trial.

b) In same unspecified way, violate Rule 10b-5 (17 C.F.R. 240.10b-5)—dismissed at trial.

c) Make false records in violation of Rules 17a-3, 4 (17 C.F.R. 240.17a-3, 4), as set forth in Counts 2 through 7 which were dismissed before trial (App. 4a).

d) File false reports with the SEC in violation of Rule 17a-5 (17 C.F.R. 240.17a-5), namely, Form X-17A-5 filed on October 16, 1969, as set forth in Count 8.

e) Extend credit from about late 1968 and early 1969 to the Martin, Bozeman, Fund of Letters and Aquarius Accounts, leaving debit balances on August 31, 1969, in violation of Reg. T (12 C.F.R. 220)—dismissed at trial (App. 8a-29a).

As submitted to the jury, Count 1 combined items (c) and (d) above, charging a conspiracy to make false records for the purpose of fooling the SEC. The false records were the entries of April, May and August 1969, set forth in Counts 2 through 7, dismissed before trial under the statute of limitations. The SEC was to be fooled by false entries in Form X-17A-5, filed October 16, 1969, barely within the five-year period of limitations (Count 8), in that: (1) The Kane trading account of Orvis was inflated; (2) Customers' securities pledged in error was not corrected; and (3) Customers' cash accounts (Qn. 6-A) was inflated (App. 83a).

Although the statute-barred entries were not set forth in Form X-17A-5, they were reflected in the report's numerical

totals. Thus, by relying at trial on one overall conspiracy, in the conjunctive, to make false records and file a false report with the SEC, the prosecution attempted to circumvent the problems raised by Anderson's pre-trial motion to dismiss because of the pleading of multiple conspiracies, most of which were statute-barred (App. 30a-34a, 38a-43a).

Anderson and Villani were tried on Counts 1, 8 and 9. Count 9 was dismissed at trial. Anderson was convicted on Count 1 and acquitted on Count 8. Villani was acquitted (App. 5a). The evidence as to Anderson and Villani was identical, except for certain prejudicially erroneous matters admitted against Anderson over repeated objection.

Questions Presented

1. Where Anderson concededly had no knowledge of the SEC rules whose violation was the object of the conspiracy, does §78q(a) by itself establish "a general standard of conduct" whose violation is made a crime, and does §78q(a) by itself make it a crime to make and file false documents, so as to permit Anderson to be imprisoned solely for its violation?

2. Where there was no evidence Anderson knew of any report to be filed with the SEC, let alone that he agreed to such filing, may a conviction of conspiracy to effect such filing be supported by his mere presence at a general partners' meeting at which no reference was made to the SEC?

3. May Anderson's conviction for conspiring to file a false Form X-17A-5 stand where: (a) He had no knowl-

edge in October 1969 of the hypothecations referred to in Form X-17A-5 or their legality or whether they had been "corrected"; (b) extensive evidence of subsequent hypothecations by Orvis into 1970 was received over objection as proof of his "wilfulness" in October 1969; and (c) to sustain its burden of proof that the hypothecations had not been "corrected," the prosecution was not required to establish a violation of Rule 8c-1(a)(3), nor was Anderson permitted to establish that the hypothecations did not violate the rule?

4. Was there any evidence sufficient to create a jury issue as to whether Anderson conspired falsely to record the Fund of Letters trade under customers' cash accounts (Form X-17A-5, qn. 6A), rather than under customers' partly secured accounts (qn. 6C)? Was he convicted under this specification of Count 1 because he was repeatedly and unnecessarily linked with Vesco?

5. Was the Due Process Clause violated by the five-year pre-indictment delay, and the prosecution's wilful failure to present the Grand Jury with testimony directly contradicting the witness without whom it concededly had no case before the Grand Jury and at trial?

Statutes Involved

The statutes are quoted in the relevant points, *infra.*

Statement of the Case

Anderson's Position at Orvis

Anderson came to Orvis in July 1966 as a 1% partner with an investment of $25,000 (2417). In early 1968 he became head of corporate finance (115, 2419), which kept him away from Orvis about two-thirds of the time (578, 582a, 1574, 2420-1). Although Orvis had over 400 employees and 30 to 40 partners (general and limited), Anderson's staff consisted of one secretary and another man who worked with him (577, 582a, 591, 609, 2418, 2429). In 1968 corporate finance made a profit of over $600,000. The profit for all Orvis was $660,687 (742, 2433-4). Because of this and the substantial capital he raised, Anderson became important in the firm. Anderson had no involvement with the back office, a very technical field not understood by the heads of many brokerage houses (1112-13).

Sloan was the most powerful partner (591). From January 1969 he had complete control over the day-to-day operations. He was the boss (627-8, 728-31). When he became managing partner (at the beginning of 1969) Sloan was in full control of the firm (857-8). He ran Orvis (1141) and was the top man in command (1157).

In early 1969, when Sloan became managing partner, Anderson became Chairman of the Executive Committee. At that time, as the Executive Committee meeting minutes of February 25, 1969 show (Ex. N, p. 2, par. 2b), the Chairman of the Executive Committee, by virtue of his position, was the chief policy officer of Orvis. However, the minutes of the March 20, 1969 meeting (Ex. 4) show a major change —the Executive Committee became the chief policy-making

body, and the function of the Chairman was reduced to implementing those policies (1607-11). This change was put through by Zalduondo (1611-12), who admitted he thus decreased Anderson's power (1686).

In addition, in Anderson's absence, on May 6, 1969, Zalduondo proposed and the executive committee ordered, that Anderson limit his underwritings to those approved by the managing partner Sloan, the research partner Mezzetta, and the financial partner Kilduff. Anderson could not act without such approval (588-90, 1622-7, 2429-30, Ex. I, p. 2, item 7). While Anderson was still away, the executive committee on June 3, 1969 discussed five new underwritings having nothing to do with Anderson (1636-8, 2430-1; Ex. 57).

Furthermore, during Anderson's absence, in May 1969, the executive committee voted three new partners into the firm—Haggerty, Vratos and Tournet (733, 829-9, 1635; Ex. AA, AO, AP).

Netelkos was brought into Orvis by Sloan in January 1970 (430, 473). When Netelkos came into Orvis he bought its furniture by paying Orvis with Manor Nursing Homes stock (520-3). Anderson opposed Netelkos and wanted him investigated (475-6). The deal (Ex. B) was unfavorable to the partners (476). It gave control to Sloan, who was to be "advised" by Netelkos. Anderson had no voice in Orvis (478). Sloan and Netelkos ran Orvis (481). Netelkos ran Orvis through Sloan (583-4).

In March or April 1970 Netelkos told the general partners the future was rosy, and Kilduff told them the ratio was within 20:1 (488). Not only did Anderson have no

voice in Orvis at this time, he was not even present at the meeting (489).

Netelkos "ranted" about Asian dollars and offices all over the world (1885-6). He didn't make much sense (1888). Nevertheless, Netelkos "ran the place" (1889).

The Issues Raised by Kilduff

The prosecution was based on Kilduff. Kilduff and his wife borrowed $60,000 to go into Orvis. With three young children, he mortgaged his future. He knew that if Orvis went under, he would lose all and could only go job-hunting in a failing securities industry. Kilduff had a deep financial interest in Orvis and wanted it to continue (526-9).

After being confronted by the NYSE with Ex. 26, his rough estimate of Orvis net capital of April 1969, in talking to Peter Schmidt, Kilduff cried and broke down (461-2a, 778). He felt very bad, very worried about his future, his welfare and his family's welfare. He felt selfish (617-18). In testifying for the prosecution he hoped it would go easier for him and that he would not be dealt with severely (625-6).

Kilduff said he lied to the NYSE during three days of interrogation in March 1971 (456-60). After taking the Fifth Amendment before the SEC, he had conversations with Assistant U.S. Attorneys on 20 different days, for 30 to 40 hours, after he was told his cooperation would be made known to the Court (463-8).

Anderson testified at length. He denied Kilduff's accusations and controverted the allegations of those prosecution witnesses who testified against him. Except for this

case Anderson has never been the subject of any proceeding for violation of any securities-related laws or any other law (2418-19).

The "Mid-April" Net Capital Ratio

Through Kilduff the prosecution contends that in mid-April 1969 the executive committee was apprised of a potential capital ratio problem under NYSE Rule 325, and thereafter conspired to file a false report with the SEC. Neither in the indictment nor in the case as submitted to the jury was net capital one of the specifications on which to base a conviction, because in 1969 the SEC had no power to enforce NYSE rules.

As the SEC's then chairman, William J. Casey, observed in his letter of December 28, 1971 to the President of the Senate and the Speaker of the House of Representatives in connection with the investigation conducted by Senator Williams' Subcommittee:

> "The Commission's present authority over the rule-making of the self-regulatory bodies is an illogical patchwork of provisions which falls short of giving the Commission authority to act promptly and effectively where a rule, or a proposed rule, is or might be injurious to the public interest. Specifically, the Commission has no power to prevent the adoption of a particular rule by an exchange, nor to abrogate it once it has been adopted."
>
> * * * * *
>
> "*A limitation of the Commission's oversight power over the self-regulatory bodies is that it cannot directly enforce their rules against their members. . . .* This

was recognized by the Commission as far back as 1941, when it recommended that it be given specific enforcement authority as an effective remedy against 'dilatory and lax enforcement' by self-regulatory bodies of their own rules," CCH Fed. Sec. L. Rep. (Special Studies Transfer Binder) ¶74,801, p. 65,509 (emphasis supplied).

Kilduff claimed that his report to the executive committee was delivered at a formal meeting in Orvis' conference room. Though formal minutes were kept of all meetings, there were no minutes of any mid-April meeting indicating either an actual violation of NYSE Rule 325 or, as Kilduff said, a problem based solely on a rough preliminary computation on a sheet of scratch paper long before final figures were available (Ex. 26). No other executive committee member—not Mezzetta, Musil, Villani or Anderson, all of whom testified—recalled any such incident. It first surfaced during the NYSE investigation in 1971, when Villani saw it, and Anderson first saw it in 1971 at the SEC (2428-9, 2742, 2751-2).

Faced with the absence of any written minutes reflecting the alleged incident, Kilduff claimed that the minutes were expurgated and that there were also impromptu meetings as executive committee members passed each other in the hall. On the contrary, Villani, who was a member of the executive committee from February 1969 to February 1970, was the secretary. He always took minutes. There was never a meeting at which there were no minutes. No changes were made in Villani's minutes, and they were circulated. There was no such capital ratio issue raised in April 1969, and there was no meeting or minutes be-

tween April 15 and May 6 (123, 2732-6, 2742, 2769-71, 2774-7).

There could have been no impromptu meetings, because the main office—where Anderson was—was at 20 Broad Street. Kilduff and Mezzetta were at 80 Broad Street, a block and a half away (785, 2466-7). Kilduff did not move to the main office until November 1969 (786, 789), effectively ruling out unscheduled impromptu executive committee meetings, unrecorded in minutes, as the members passed in the hall.

On February 17, 1969, Kilduff truthfully told the partners he expected a 1969 profit of $1,500,000 (744-5; Ex. 8, p. 4). On March 11, 1969 Kilduff truthfully told the executive committee that the capital ratio was "a healthy 14.6:1" (750-1; Ex. 28, p. 2). Yet it was Kilduff's contention that one month later he pressed the panic button and a conspiracy began. This was nonsense.

Kilduff said that in April 1969 a matter dealing with Orvis' capital computation under NYSE Rule 325 was left out of the minutes (146-50). He placed the time vaguely—in "the second or third week in April"; "around the 15th to the 22nd—something in that area"; "best recollection [is] some time between April 15 and 26"; "I might well have had it (Ex. 26) at that [April 15] meeting [at which Musil was present—see Ex. 11] or the next meeting that we had"; "I can't say for a fact . . . I cannot give the date of the meeting"; "not before April 15 or after April 22"; "in that [April 16] area of time"; "I can't say exactly when no matter how hard I try" (examiner's words); "unlikely" it was before April 22; "I simply find it impossible to say" (146-50, 159, 191, 194, 197, 199, 204-5, 272, 529-30,

777-80, 820). Kilduff could not recall the dates of meetings and would only be speculating (586-7). He did not recall what was said at the April 15 meeting (756-8).

The importance of pinpointing the date arises from the $27 price for Clinton Oil stock in Ex. 26. Because of that price, it is "unlikely" [indeed, it is out of the question] that the meeting occurred before April 22 (779-80).

Kilduff conceded when shown Ex. K (prepared by the Government) that Clinton Oil was at 27 "around April 22, a day or so on either side" (536-6A), so the meeting could have been on April 22 (537). In fact it was not *until* April 22 that the price was 27, as Kilduff was told by an investigator in the U.S. Attorney's office (538-9, 562-4; Ex. K). In all likelihood the $27 price was obtained on April 22 (574-6).

Kilduff said that he discussed Ex. 26 with Eucker before the meeting, at the meeting, and again a few days after the meeting—between April 22 and April 24 (543, 547-8, 562, 568-9, 663). However, Eucker's last business day before leaving with his family for a vacation in India was Friday, April 19. He returned on May 1 (569, 606-8, 2412-13; Ex. 11, p. 3, item 7). Kilduff could not have had his several alleged discussions with Eucker before April 22 because of the $27 price, and he could not have had these discussions with Eucker in April after April 19 because Eucker was gone.

He could only have talked to Eucker—if indeed he did at all—upon Eucker's return on May 1, when Anderson was away (576, 2426).

Ex. 26 contains estimates of March and April profit and loss. Nor were the rest firm figures, and, moreover, there

are "two other question marks under two separate items" (195, 543-4). For April Kilduff estimated a $225,000 loss, which turned out to be $160,000, a $65,000 error against Orvis (544-5). The March 1969 P & L was not ready until the first week of May (when Anderson was gone) and the April P & L not until early June (905-6), so reasonably accurate figures could not have been available in the mid-April 1969.

On Ex. 26, the top figure (credits "per anal.", $5,100,000) comes from an analysis prepared by Bascom of the accounting department. So does the debits figure "per anal." of $3,110,000 (211, 530-1, 562, 580). These are the two largest items on Ex. 26. Bascom's analysis was not available (782).

However, there was a capital computation *as of April 30, 1969* done by Bascom in the third or fourth week of May (when Anderson was away), showing a 34:1 ratio. Bascom could not vouch for its accuracy (924-6, 928). He showed it to Kilduff and put it back in the file cabinet where it was kept under his supervision (930). If that was the reference Kilduff made by "per anal.", Ex. 26 could not have been shown to Anderson.

Ex. 26 did not include the large block of Clinton Oil stock in the Orvis trading account (531), for which Kilduff had a separate entry on Ex. 26 of 14,300 shares at $27. However, by April Orvis had 60,700 shares of Clinton Oil (Ex. H), which gave it far more capital than Kilduff computed (46,400 x $27, less the 30% haircut). And by April's end, the price was at 30 (567-8; Ex. K), giving Orvis still more capital.

It took Kilduff about a month to get an accurate capital ratio. Anything done on a daily basis was a rough approximation using estimates (599). Whoever saw Ex. 26 had no way of knowing what the final figures would be (546-7).

At Orvis computations were done twice—first a rough draft based on a preliminary trial balance using estimates and educated guesses. At Orvis it was normal to go from 60:1 to 20:1 because final figures were late. The rough draft could be very far off from the final result (1051-2).

When a capital computation based on preliminary worksheets exceeded 20:1,* the whole firm made an effort to get the ratio reduced (915-16). Efforts were made to find lost dividends and securities, to get payments in and correct mispostings of cash receipts, etc., bringing the ratio from 26.6:1 down to 18.5:1 (945-50).

The capital computations were done by Bascom and Mattei and reviewed by Kilduff with Eucker's assistance (155). The paper crunch in 1969 affected the currency of the figures going into the capital computations (952). The accounting department was understaffed and overworked (1056).

Bascom made a $1,000,000 error against Orvis in computing capital in 1969—"in the general area of time we are talking about now," which put Orvis widely out of ratio (580-1). The additional $500,000 loss found in the Kane trading account on August 19, 1969 (337-40) arose from Bascom's mistake. The mistake resulted from his "faulty estimates" and not following up entries (685-6, 708-10; Ex. Y).

---

* Such a preliminary draft computation, Ex. 99, was admitted over the objection that it was for June 1968 (920, 942).

Shortly after Bascom was replaced by Mattei,* who also made a $1,000,000 mistake against Orvis in computing capital (689-90). In October 1969 Mattei did a capital computation as of August 31, 1969 showing a ratio of 62.2:1, as the result of a $1,000,000 error. The NYSE found the error in the Spring of 1971. The correct ratio was 19.39:1 (1034-7). Kilduff did not find the error (1056). Also, Mattei erroneously overpaid Clinton in computing interest on his subordinated loan account (261-3).

Bascom got capital ratios of 19:1 for March 31, 1969 and 13.3:1 for May 31, 1969 (962-3). He never got over 20:1 in a final computation (961-2). When Bascom left Orvis he felt they would not have any problem about capital (968-9).

There were gray areas in computing capital under NYSE Rule 325. Accountants frequently differed among themselves, and financial men in brokerage houses disagreed with the auditors, arguing back and forth over interpretations (951-2).

It is in this context that one must view the alleged mid-April meeting at which Kilduff claims to have produced Ex. 26. According to Kilduff, Sloan said that more capital was coming in, keep the place going. Anderson said he thought he could get more capital—keep the place going. Villani said he would raise more capital, and Eucker said he would reduce the charges that were hurting capital (207).

And why not keep the place going? Was Orvis with 450 people to go out of business immediately after Kilduff had

---

* Mattei had never computed capital before being given the job by Kilduff, who gave him NYSE Rule 325 to read. For Mattei it was on-the-job training (1048-9).

honestly predicted a $1,500,000 profit for 1969 and had truthfully reported a "very healthy" capital ratio—solely on the basis of two pieces of scratch paper consisting of rough estimates and projections a month and a half before the final figures?* Of course not. The answer was to get more capital, as the participants are alleged to have said. Kilduff did not claim that Anderson told him to make a false record or to file a false report.

The Clinton Transactions

Sloan was the Orvis contact with Clinton. Any Orvis transaction or deal with Clinton went through Sloan (167-8, 714).

A. 1969 Oil & Gas Units—Commission Receivable Account 55-1400

Sloan was the partner primarily concerned (182). Orvis sold $17,000,000 of the Units in 1969, at a 6% commission—approximately $1,000,000 (177-9, 185, 2171-2, 2181). The purchasers paid Clinton directly—10% on contract, 30% April 15, 30% July 15, and 30% October 15 (2229-30; Ex. AH).

Ex. AH, the prospectus, does not say when the Orvis commissions are payable (1205-7, 2228). However, Orvis earned its commission when it made the sale (180-1), and Clinton said Clinton Oil would pay as the money came in (2229-30).

At an executive committee meeting in early March 1969 Sloan told Kilduff to take the commission into profit and loss (187-8). It was proper to put the commissions in P & L

---

* April P&L came in early in June (905-6).

in the month of sale (629-30). Kilduff said the receivable should be charged against capital if it was not to be received in 30 days (190).* Sloan said: "Let's take it into capital and just make sure that the capital looks all right." Anderson said nothing (191).

The $797,000 receivable was put on the books in April 1969. No one told Kilduff to enter it as Account 55-1400, a customer's cash account. He decided on his own, so that the auditors would be less likely to recognize it if they came in at the end of that month (223-6). In fact the entry was made on April 30 (Ex. 30; 632-3), when Anderson was away (2426).

When Account 55-1400 was set up with the $797,000 debit, it had no name or address—hardly likely to fool Haskins & Sells—and there was none for the statements of May, June or July (632-4). Kilduff never said Anderson told him how to enter the receivable, nor did he say Anderson ever knew it was entered in a customer's cash account.

Eucker and Kilduff discussed the debit in Account 55-1400 with Sloan, who approved moving Clinton's personal stock from his subordinated loan account into 55-1400 before the end of August 1969 (243-6, 253-4). Kilduff did not discuss this with Anderson (247); but later on he had a conversation with Anderson *or* Villani (247-8), at an executive committee meeting around September 1969 at which Kilduff "would bring out the various things that were used to prop up the capital." Eucker and Sloan were also present. *There could have been others.* (All "others" who

---

* By mid-March 40% was receivable within 30 days.

testified—Mezzetta, Zalduondo and Musil—denied such discussion occurred at any time.)

On August 5, 1969—before the audit as of August 31, 1969—Kilduff instructed Michael, Orvis' comptroller (879), to accrue only one-third of the $900,000 Units commission receivable. But Michael did not understand and left $900,000 on the books (888-9, 894-6; Ex. Z, 44). When Kilduff appointed Michael comptroller in the Spring of 1969, Michael said he was not qualified (879, 902-3).

Had Michael followed Kilduff's instructions, there would have been no issue as to the amount in Account 55-1400, because $290,000 had actually been received and credited prior to August 31, 1969 (243-4, 712).

Moreover, as of the August 31 audit, 70% of the commissions—over $700,000—was then payable and was properly computed in capital. Ex. 156, the SEC chart introduced over objection through Schwartz, improperly deducted most of this on the erroneous ground that it had been accrued on April 30 (2282-3). It had been properly accrued in P&L on that date (in Anderson's absence), but that was not the issue. It was in fact "good capital" on August 31, 1969.

B. Salesmen's Share of Units Commission Receivable

Orvis salesmen who sold the Units were entitled to a 40% commission from Orvis' 6%. This was deducted from P&L, with Kilduff entering the net. At an April executive committee meeting Kilduff suggested not accruing commissions due the salesmen. Neither Anderson nor anyone else said anything (240-2).

C. Clinton's Subordinated Loan

Clinton became a subordinated lender on June 5, 1969. Kilduff visited Clinton in April to discuss it (509-10), but Sloan conducted the main negotiations. Clinton put up about $2,000,000, primarily Clinton Oil stock, which Clinton delivered in person to Sloan. Kilduff took the stock to the cage (249-52, 2172).

In August 1969 Eucker, Kilduff and Sloan moved stock from Clinton's subordinated loan account into Account 55-1400. (Par A, *supra.*) This was permitted under Clinton's subordinated loan agreement, Ex. 112, which allowed the stock to be dealt with as partnership property, transferred, etc. (2242). Orvis sent monthly statements to its subordinated lenders (252-6). It was standard procedure for the auditors to send Clinton confirmations showing the transfer of his securities from his subordinated loan account to Account 55-1400. A subordinated lender got a copy of his account with a letter of explanation. Clinton never disputed the transfer (650-2, 1364-71, 1373-5).

D. 4,344 Shares of Clinton Oil

About March 3, 1969 4,344 shares of Clinton Oil were sent by Clinton to Orvis (Ex. 38). At the next executive committee meeting Sloan said they were "for the partners". Over objection, Kilduff said he understood this to mean the stock was being purchased for a pre-determined price, which he did not know (263-7). Sloan said it was to be used as capital. Anderson said nothing (267-8).

The stock was placed in the trading account. Anderson had nothing to do with it (269-70). It was posted on April 16, 1969 (272). The prosecution argued that the vice was

that the stock was taken in without cost (275-6). But there was no evidence of any cost to be attributed to the stock, let alone that Anderson knew the cost or authorized its recording—either with or without cost.

The cost of the 4,344 shares was posted in August 1969 when instructions as to cost came from Clinton (Ex. 44; 294). The shares were costed before Haskins & Sells arrived—even though it would hurt capital. Kilduff told the executive committee the cost had been charged to the trading account and had hurt capital (296-8), hardly a conspiratorial act. The others said nothing (297).

The 4,344 shares were costed when Clinton made a \$290,000 partial payment on the Units commissions receivable and deducted \$171,288 for the shares (712). Sloan gave Kilduff the price agreed with Clinton (714). Ex. Z is Kilduff's memo of August 5, 1969 to Michaels (and supporting documents) about costing the 4,344 shares (718-19). Adding the \$500,000 in late August, Orvis received \$790,000 as of August 31, 1969 toward payment of the commissions receivable on the Units (Account 55-1400).

E. 5,000 Shares of Clinton Oil

In May 1969 Sloan received 5,000 shares of Clinton Oil from Clinton. Sloan gave them to Kilduff "for the partners", instructing him to use it as capital. Eucker put the stock in the trading account without cost. Anderson was not present (286-8). In fact, Anderson was in Europe (2426). In August "this" was discussed at executive committee *or other* meetings. Anderson said nothing (289-90, 292).

The SEC chart, Ex. 156, erroneously handled this transaction by doubly charging Orvis. Because Orvis had not

paid for the shares, it (1) decreased capital by $150,000, and (2) increased debt by $150,000 (2288-9).

F. 80,000 Shares of Clinton Oil

Orvis sold 80,000 shares of Clinton Oil at 11 for $880,000 to Clinton's Pension Fund at the end of August 1969. Sloan was responsible for the trade (373-4). Before the trade Kilduff, Eucker and others pressed Sloan to make the sale. Sloan said he would see what he could do. On his return Sloan announced the sale of 80,000 shares "to Clinton" without specifying any entity (375-6, 722-4). Later, Sloan prepared the order ticket (380), gave Kilduff the name and address for the account (383, 723-4), and placed the trade with Tournet (842-3). Anderson did not (854).

In September in Anderson's presence, Kilduff and Eucker asked Sloan about payment. Sloan said Clinton would take care of it (383-4, 724). Kilduff thought it a good trade until May 1970 (724-5). Villani thought it was a good trade (2741). Anderson thought it was a good trade (2551-2).

That is understandable. Clinton testified that when he met with Doggerel, Sloan and Anderson on August 22, 1969* there was mostly a one-way conversation—Sloan to Clinton about: Clinton lending Doggerel money so the latter could add it to his Orvis capital; and the possible purchase by the Clinton Pension Fund of 80,000 shares

---

* Clinton placed the meeting at the Memphis Country Club, but conceded on direct and in anticipation of Anderson's testimony (Anderson testified before the SEC in 1971) that he stayed overnight at the Howard Johnson Inn and met Sloan and Anderson near the elevator (2193). Anderson said the meeting was in the room he and Sloan occupied there (2538-43).

of Clinton stock, which would have to be discussed with counsel (2189-92, 2237).

Sloan did all the talking. Clinton could recall nothing said by Anderson (2192-3). According to Clinton, "Sloan could have concluded . . . that a deal had been made" (2238). And, as Zalduondo said in another context, "Every time Rick Clinton spoke, you thought you were going to be a rich man" (1586).

Clinton had a real concern about Orvis' large position in Clinton Oil stock. When Gamelson and Smith came to see Sloan on August 28, 1969 at Clinton's instructions (and were sent by a secretary to Anderson), a very important purpose was to check Orvis' inventory of Clinton Oil stock (1163-4) and to find out if Orvis was dumping the stock (1196, 1214). This was the first subject Gamelson and Smith discussed with Anderson, because Clinton had expressed concern, using the word "dumping", and was worried about large selling in the market by Orvis (1270-3).

Gamelson himself had 418,000 shares of Clinton Oil which sold at 30 during mid-1969 (1188, 1204-5, 1215), worth over $12,000,000 on paper. Clinton had over 1,000,000 shares (1215). The sale of 80,000 shares would depress the price by a couple of points at least (1115). If other brokers heard Orvis was dumping, they would lower their bid, depressing the value of the stock (1215-16). Clinton said Gamelson was more concerned than he was (2235-7).

Anderson did not try to persuade Gamelson to put money into Orvis. On the contrary, Anderson returned the stock Mr. and Mrs. Gamelson had offered to contribute as a subordinated loan (1164, 1193), which was 25,000 shares at 30 worth $750,000 (1211).

As Gamelson said, Orvis controlled 600,000 to 700,000 shares at the time—probably more than anyone else. Orvis was also very important to Clinton Oil, because Orvis was selling the drilling ventures (Units) and maintaining a very active market in the stock (1200-1). No wonder Clinton's conversation with Sloan convinced Anderson there was a deal.

Haskins & Sells never received the spurious letter purporting to deny the trade—Ex. 108, received over objection (1173-6) and read to the jury (1175) on the prosecutor's representation that Clinton would say he sent it (1397). Clinton did not so testify. He could not recall (2197-9).

Vayda of Haskins & Sells explained the procedure whereby exceptions to confirmations are logged, and said no exception was received for the 80,000 share trade—or, for that matter, in connection with Clinton's subordinated loan or the Units commission account 55-1400 (1364-71, 1373-5). He said Ex. 108 was not received by Haskins & Sells (1372-3, 1375).*

Kane Trading Account

On August 19, 1969 an additional loss of $500,000 was found in the Kane trading account by Kilduff's department. Kilduff told Sloan (337-40). Sloan reported it to the general partners meeting on August 20, and there was an outcry to fire Kane. In answer, Sloan said that Orvis' relationship with Clinton would be seriously impaired if

---

* Ex. 108 is addressed to Haskins & Sells at the post office box used for the 1969 audit confirmations—P.O. Box 246, Wall Street Station, indicating the Clinton entities had received the confirmation requests.

Kane left, because Kane was very close to Clinton and was important to his stock in which he made a market. Sloan said he had just phoned Clinton, who would wire $500,000 cash to Sloan personally as a loan to add to the firm's capital (174-5, 701-2, 697-9; Ex. 61).

Mezzetta said that if Kane wasn't fired, Orvis was in the control of Clinton (1833-4). Anderson took no position (175-6).

Clinton sent $500,000 to Sloan before the end of August 1969. Sloan told Kilduff and Eucker it was not a loan to him, but part payment of the Units' commission receivable. Sloan told Kilduff to use it as capital. At Kilduff's suggestion it was put in the Kane trading account by Kilduff and Eucker. Anderson was not present at the discussions and had nothing to do with the entries (354-60).

In early September Kilduff told the executive committee he had put the $500,000 in the Kane trading account. Anderson said nothing (361-4). Sloan had previously told everyone Clinton had sent him the money personally (340, 342, 344).

Anderson did not supervise Kane (2424-5). Kane reported to Sloan (176); and Bascom and Ridberg reported to Kilduff, never to Anderson, on a daily basis about the Kane trading account (954-6, 1044-5).

From November 1968 Kamansky alone was assigned to supervise Kane. Then there was a committee consisting of Kamansky as chairman, Mezzetta and Kilduff. Tournet was added in June 1969. Anderson was not on the committee (172-3, 664-8, 1440-1475; Ex. Q, R, 3).

On March 10, 1969, attempting to supervise Kane, Kilduff wrote to Kamansky about the Kane trading account.

He sent a copy to Sloan, not to Anderson (672-5). The Kane committee met in March and twice in June 1969. Anderson was never a participant (676-8, 681, 683-4; Ex. T, U, V). There was no document or communication involving Anderson in the running or supervision of the Kane trading account (684, 811-12), although Kilduff wrote many reports about Kane (703)—e.g., Ex. W on Sept 23, 1969 to Kane, Mezzetta, Kamansky and Sloan, but not to Anderson (704); Ex. X on September 18, 1969 (706-7); Ex. Y (708-9).

August 20, 1969 General Partners Meeting

At the August 20, 1969 general partners meeting, attended by about 30 people, Sloan said Orvis needed $1,-500,000 more to stay in business, that Clinton was sending him $500,000, and that left $1,000,000 to go (340, 342, 344). According to Kilduff, Sloan told the public stenographer not to take certain portions and at one point asked her to leave the room. Anderson did not say or do these things (349-50).

After she left there was a discussion of capital (350-1), which is in fact recorded in the circulated minutes (351). Kilduff told the meeting Orvis needed new capital to survive (694). From the Sloan-Kilduff comments, Doerle concluded that Orvis may be out of ratio (695-6). There was no conspiratorial conduct by Anderson at that meeting.

Hypothecation

Kilduff never discussed hypothecation with Anderson or any other Orvis personnel (417). As of August 31, 1969 Orvis had $35,271,132 worth of stock which it could use as collateral for bank loans, including substitution for cus-

tomers' securities pledged or loaned in error (2252-5; Ex. BP, qn. 5).

The Conduct of the Audit

Haskins & Sells, one of the Big 8, with decades of experience (493), conducted the 1969 audit (156). They had audited Orvis for 20 years (396). Sturgis was the partner in charge. Vayda and Taggart were under him. 25 Haskins & Sells people were directly involved in the audit (393-4). Over 1,000 man-hours were spent by the auditors (2340). Kilduff and Eucker were in charge for Orvis (395). When Haskins & Sells arrived they said hello to Sloan and Anderson, after which they dealt with Kilduff and Eucker (396, 1320-1).

The review meeting for Form X-17A-5 was on October 15, 1969. Sturgis, who was in charge (2338-9), listed those appearing for Orvis in his diary. They were Sloan, Eucker and Kilduff. Anderson was not present (Ex. BP, 74-B; 2344-5).

Taggart, who was also present for Haskins & Sells, said he was joined by Sturgis and Vayda (1387), and that Sloan, Eucker and Kilduff appeared for Orvis (1388-9).

Vayda said he appeared with Sturgis and Taggart for Haskins & Sells, and that present for Orvis were Sloan, Eucker and Kilduff, but that he was not sure of Anderson and Villani (1322, 1358). He could not recall the participants (1323). At the NYSE he had testified that Sloan, Eucker and Kilduff were present and "perhaps someone else or perhaps two others, but I just can't, you know, recollect" (1358-60a). Vayda conceded he could not say Anderson or Villani was there—only "it could possibly be that it could have been Mr. Villani or Mr. Anderson" (1362-3).

Kilduff had both the Haskins & Sells and the Orvis participants wrong. For Haskins & Sells he named Petrillo, Sturgis and Vayda (411). Petrillo (who had worked on prior audits) had nothing to do with the 1969 audit (see Ex. BN, the list of personnel; 2339). Kilduff alone placed Anderson at the meeting (412).

Kilduff was clearly wrong. Anderson testified he was at the World Series that day. He lived in Forest Hills and went directly to Shea Stadium from home. After the game he went to a meeting of Clinical Health Science, a company in New Jersey (2632-3). Sturgis' diary (Ex. BP) and his diary extracts (Ex. 74-B) contain no reference to Anderson anywhere (2341-5, 2357).

Vayda could recall none of the specifics as to what was discussed at the review. For example, he did not recall any discussion as to what went into Item 6-A on the Form X-17A-5—the very customers' cash accounts in issue (1375-8, 1380).

In discussing Form X-17A-5 Vayda referred to the financial questionnaire "that was submitted to the New York Stock Exchange" (1323). The form was also filed with the SEC and various states (1326). But note that the cover page says "(For Filing with the New York Stock Exchange)", and that Haskins & Sells' opinion on the first page refers to its examination in accordance with New York Stock Exchange requirements, to the form required by the New York Stock Exchange, and to the Schedule of Information required by the New York Stock Exchange (Ex. BP).

The 4 Problem Accounts

At an executive committee meeting in mid-August 1969—at which Musil "could have been present" (Musil recalled no such discussion), Kilduff mentioned the 4 bad debts—Aquarius, Martin, Bozeman (none of which were Anderson's accounts) (493-7, 506) and Fund of Letters,* which were not charged against capital. (This is not one of the indictment's specifications). Anderson said nothing (309-10).

Orvis' records reflected that the 4 accounts had been outstanding a long time. They contained no false dates. They were fully available to Haskins & Sells (492-3). They were not false records. The accounts were not charged against capital**—which is not the issue—to which the auditors agreed; but they were continued under customers' cash accounts instead of customers' partly secured accounts —which is at issue—to which the auditors also agreed.

During the 1969 audit Haskins & Sells had a list of the accounts with the large debits (1016-17). Vayda of Haskins & Sells was familiar with the 4 accounts—Fund of Letters, Bozeman, Aquarius and Martin. He knew they were included in the dollar figure for customer's cash accounts, that they were deficit, and that they were only partly secured (1327). Kilduff told him it was one of the exposure areas (1328).

As a result, Haskins & Sells approved doubling the reserve for customers cash accounts and left the 4 accounts

---

* Anderson received no commission on this or any other of his accounts (2582).

** The NYSE examiners in December 1969, two months after the Haskins & Sells' Form X-17A-5 filed October 16, 1969, treated the accounts differently (604).

in customers cash accounts (1328). This was also done with the 80,000 share trade (1330-3). The reserve was doubled to $600,000 (1378-9). Taggart of Haskins & Sells said he too was aware of the accounts (1389-90).

Form X-17A-5, Item 6-A, customers' cash accounts—the very item in issue with respect to the Fund of Letters, Martin, Bozeman, Aquarius and Clinton Oil Profit Sharing Accounts—prominently refers to Note 1, which reads:

> ". . . A reserve has been provided for accounts considered doubtful of collection; . . ." *

Anderson should not go to jail for an accounting interpretation of a New York Stock Exchange rule made by acknowledged experts who had audited Orvis for 20 years.

Goodbody Report

Goodbody and Duffy did an Orvis back-office report (Ex. 71). No part of it was linked to Anderson (1075). Anderson attended an executive committee meeting on Aug. 11, 1969 at which Eucker submitted his answer, Ex. 72, to the Goodbody report which was a critique of the back office.

The meeting was really an argument between Goodbody and Eucker as to the acuracy of Ex. 71 (1078-9, 1105). Eucker said he was right and Goodbody was wrong (1111). Goodbody (who sought Eucker's job, according to Villani) claimed no fraud, but only inefficiency (1103). Eucker denied the incorrectness of reports or questionnaires (1105-6).

---

* The author of Ex. 156, the SEC chart, placed a zero value on about $400,000 of collateral.

Goodbody had no recollection which subjects in the report were discussed at the meeting (1082-3), which lasted only an hour or less (1105, 1113). Ex. 71 *id.,* the full report, is 63 pages, exclusive of exhibits. Only pages 23-4 and 31-3 are in evidence.

Page 31 refers to reports to regulatory agencies but mentions only the NYSE special operations questionnaire (see Ex. J). If the Government improperly seeks to go outside the record and claim a *sub silentio* reference to the SEC, Anderson asks the Court to inspect the Grand Jury testimony of Dennis Duffy on July 31, 1974 (Ex. 3533 *id.*), referred to in part in App. 166a. Duffy, who "did most of the work" (p. 42), was referring to the NYSE special operations questionnaire which he did not recall being discussed at the meeting (p. 54). This reference was not an attempt to point out that there were any violations (p. 46).

Musil and Mezzetta also attended the meeting on Aug. 11 (1113). Neither said anything in his testimony at trial about hearing any reference to any report to the SEC.

Anderson did not commission the report. At the meeting he said nothing (1080). When a vote was taken, it was 3 against 3, with Eucker abstaining. Anderson sided with Goodbody (1083-5).

POINT I

Having been convicted of conspiring to violate SEC rules of which he was concededly ignorant, Anderson may not be imprisoned under 15 U.S.C. §78q(a).

Anderson was convicted of conspiring (18 U.S.C. §371) to violate 15 U.S.C. §§78q(a), 78ff, and 17 C.F.R. §§240.17a-3, 4 and 5 (Rules 17a-3, 4 and 5, promulgated pursuant to the authority of §78q(a)). (App. 259a). He was sentenced to imprisonment for a year and a day, although the Court found "no persuasive reason for disbelieving Anderson's testimony" * that he had been unaware of the rules, observing that the Count 8 acquittal may have been based on the jury's acceptance of Anderson's testimony in this general regard (App. 256a-257a).

Accepting the prosecution's argument that Anderson was convicted of conspiring to violate a statute, §78q(a), and not a rule, the Court erroneously rejected Anderson's claim that a prison sentence could not be imposed, squarely holding:

> "Anderson was accused and convicted of conspiring to violate 15 U.S.C. §78q(a) which makes it a crime to make and file false and inaccurate records and documents * * * The 'no knowledge' proviso was not intended to permit one who knowingly conspires to violate the general standard of conduct set forth in 15 U.S.C. §78q(a) to claim protection on the ground that he did not have knowledge of some specific rule or requirement promulgated thereunder" (App. 255a-256a).

---

* See Anderson's testimony at sentencing on June 16, 1975.

The Court was wrong. §78q(a) provides in substance that certain entities are required to keep such records and to make such reports as the SEC may prescribe by its rules and regulations. Other than to set forth in general terms the types of documents which the SEC may by its rules and regulations require to be kept, the section imposes no requirement whatsoever on any of the entities within its ambit. Furthermore, §78q(a) does not specify any report that is required to be made, other than those which the SEC may require by its rules and regulations. Finally, §78q(a) does not itself make any conduct unlawful, nor does it impose any penalty whatsoever. Contrary to the Court's opinion, it makes nothing "a crime", nor does it contain "a general standard of conduct."

The penalty provision for violation of the 1934 Act is set forth in 15 U.S.C. §78ff(a); Securities Exchange Act of 1934, Section 32(a). It makes unlawful, and prescribes the punishment for, violations of the 1934 Act and any rules or regulations promulgated thereunder the violation of which is made unlawful or the observance of which is required under the terms of the Act.

As the conspiracy count ultimately went to the jury, the violation which was the object of the conspiracy was a violation of "the recordkeeping and reporting regulations promulgated by the SEC under §17(a) of the Securities Exchange Act [§78q(a)], 17 C.F.R. §240.17a-3, 5." *United States* v. *Solomon*, 509 F.2d 863, 865 (2d Cir. 1975). Absent Rules 17a-3, 4, and 5, there was no unlawful conduct whatsoever. It was the violation of the rules which was alleged to be the object of the conspiracy. If it is the prosecution's contention that the illegality arises from a violation of the provisions of §78q(a), and not from a violation of the rules

promulgated thereunder, then no crime is charged and judgment of acquittal should be entered, because §78q(a) standing by itself does not require anything to be done, let alone make its improper commission a crime.

Anderson was sentenced under Count 1, the conspiracy count. 18 U.S.C. §371 provides in pertinent part:

> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

To determine whether "the offense, the commission of which is the object of the conspiracy, is a misdemeanor only," we must look to 18 U.S.C. §1, which provides:

> "Notwithstanding any Act of Congress to the contrary:
>
> "(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> "(2) Any other offense is a misdemeanor.
>
> "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both, is a petty offense."

Because Anderson concededly had no knowledge of Rules 17a-3, 4, and 5 (the rules he was convicted of conspiring to violate), under 15 U.S.C. §78ff(a) he could not be imprisoned for a substantive violation of such rules, but could only be fined an amount not to exceed $10,000:

> ". . . shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

Under the sentencing provisions of §78ff(a), as to Anderson, "the offense, the commission of which is the object of the conspiracy, is a misdemeanor only," as defined in 18 U.S.C. §1; and under 18 U.S.C. §371 "the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor"— fine of \$10,000.

The Court's reliance on *United States* v. *Lilley,* 291 F. Supp. 989 (S.D. Tex. 1968) is misplaced. In *Lilley,* defendants pled guilty to a substantive violation of Rule 10b-5 and moved to have imprisonment excluded from the sentence which Court might impose under the "no knowledge" clause of §78ff(a). The Court denied the motion, pointing out that the activities which the defendants had admitted by their plea of guilty violated not only Rule 10b-5 but also the express provisions of §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), which prohibits securities fraud in language almost identical with the language of Rule 10b-5, and §9(a)(2) of the Securities Exchange Act of 1934, 15 U.S.C. §78i(a)(2). Unlike §17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a), here in issue, both §17(a) of the 1933 Act and §9(a) of the 1934 Act specifically provide with respect to the proscribed conduct that "it shall be unlawful . . ." The Court pointed out that it would

frustrate the intent of Congress to permit a person whose conduct was expressly prohibited by statute to avoid punishment through proof of no knowledge of a parallel rule. The *Lilley* case is clearly inapplicable, because, unlike *Lilley,* there is no statutory prohibition ("it shall be unlawful") comparable to the rules here in question.

The prosecution can take no comfort from *United States* v. *Peltz,* 433 F.2d 48 (2d Cir. 1970), *cert. den.,* 401 U.S. 955 (1971). In that case appellant had made no effort to bring himself within the "no knowledge" proviso of §78ff(a) (433 F.2d at p. 55, note 7). In *Peltz* the issue was whether the prosecution had to prove the defendant's knowledge of the SEC rule that was violated in order to establish any criminal liability for violation of such rule. Rejecting Peltz' contention that such knowledge was necessary as part of the prosecution's case, the Court held that knowledge of the existence of an SEC rule is not necessary to establish criminal liability for the violation of such rule, it only being necessary that the defendant shall have knowingly committed an act which involved a significant risk of effecting the violation which has occurred.

The Court state that its conclusion was supported by §32(a) of the Securities Exchange Act of 1934 (15 U.S.C. §78ff(a)), which provides that lack of knowledge of the rule or regulation prevents imprisonment but not a fine. The Court regarded the "no knowledge" proviso as illustrative of the Congressional intent that knowledge of the rule was not necessary to establish a wilful violation, but applied only to the penalty which might be imposed once a wilful violation has been established. *Peltz* is the short answer to the Trial Court's belief that the "no knowledge" clause is inapplicable because of the conviction under Count 1 as charged.

In *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir. 1972), *cert. den.*, 409 U.S. 1009 (1972), appellant had been convicted under a one-count indictment for conspiring to violate §8(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78h(c) and Rule 8c-1 promulgated thereunder, dealing with the hypothecation of securities.* Schwartz was fined $2,500. On appeal Schwartz argued as follows: although he had knowingly hypothecated the securities while aware of the rule, he had not realized that his conduct was violative of the rule, and, accordingly the requisite *mens rea* was not proven under §78ff(a). The Court rejected the argument, holding that there can be a wilful violation without knowledge of the rule, whether the charge be for a substantive violation or a conspiracy.

The type of sentence under §78ff(a) was not in issue. However, the Court's repeated references to §78ff(a) (Section 32(a), Securities Exchange Act of 1934) make it clear that a substantive violation of §78h(c) and the rule thereunder results in a conviction under §78ff(a):

> ". . . a conviction under §32(a) for a violation of §8(c) and the regulation adopted pursuant thereto" (464 F.2d at p. 509, par. 12).
>
> * * *
>
> ". . . a conviction under §32(a) of the Act . . ." (464 F.2d at p. 509, par. 13).
>
> * * *
>
> "a substantive conviction under §78h(c) and 78ff of the Act . . ." (464 F.2d at p. 510, par 14).

---

* It should be noted that, unlike Section 78q(a) dealing with recordkeeping and reports to be required by the SEC's rules which does not itself denominate any conduct as unlawful, Section 78h itself provides that *"it shall be unlawful"* to hypothecate securities in contravention of the SEC's rules and regulations.

Accordingly, the prosecution cannot seriously contend that §78ff(a) is inapplicable in determining whether the substantive violation of §78q(a) in Anderson's case is a felony or a misdemeanor. Since it is clearly a misdemeanor, the punishment under §371 may not exceed a fine of $10,000 and no jail sentence may be imposed.

POINT II

There was no evidence that Anderson conspired to file any false report with the SEC. The Court's instructions erroneously permitted a conviction on a conspiracy of silence by inference from his presence at a partners' meeting, where there was no mention of the SEC.

The prosecution failed to sustain its "burden of offering proof allowing a reasonable jury to be convinced beyond a reasonable doubt," *United States* v. *Simon,* 425 F.2d 796, 798 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970), that Anderson conspired to file a false report with the SEC.

Attempting to cope with an indictment alleging the statute-barred making of false records and multiple conspiracies in Count 1, the Court reduced Count 1 to one overall conspiracy linked to one overt act, the October 16, 1969 filing of Form X-17A-5 (2299, 3036, 3067; App. 23a-29a, 91a, 122a) by the following issue: Did Anderson conspire to file a false report with the SEC in that: (1) The Kane trading account of Orvis was inflated; (2) Customers' securities pledged in error was not corrected; and (3) Customers' cash accounts (Qn. 6-A) was inflated (App. 83a)?*

---

* The Court instructed the jury (App. 82a-83a):

"The only crime charged is that these defendants are claimed to have kept false records and to have filed false reports, to conceal their imminent or actual insolvency.

(footnote continued on following page)

There was a total failure of proof that Anderson conspired to file any report with the SEC. It is conceded he had no knowledge of Rule 17a-5, and there was no testimony that he or anyone in his presence even mentioned filing a report with the SEC. Moreover, even Kilduff, without whose testimony "there would have been no indictment and there certainly would not have been any case at all," according to the prosecution (TR 6/16/75, p. 29), did not say Anderson told him to make any of the false records whose figures were incorporated into Form X-17A-5, let alone that they should be made for inclusion in a report to the SEC.

(footnote continued from preceding page)

What, then, is the particular section of the securities laws which defendants are charged with violating and with having conspired to violate?

It is a section of the 1934 Act which provides in pertinent part as follows:

'Every broker or dealer'—and obviously the firm of Orvis Bros. was a broker and dealer—'shall make, keep, and preserve such accounts, correspondence, memoranda, papers, books and other records and make such reports as the Securities and Exchange Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.'

The principal SEC regulation with which we must concern ourselves is the one requiring brokers, such as Orvis Bros., periodically to file a questionnaire—that is what it is called—setting forth certain specified financial information.

It is the claim of the Government that the defendants conspired to file such a questionnaire with certain materially false information and that in October of 1969 they actually did file or caused to be filed a materially false questionnaire.

The said questionnaire is claimed to be false in the following particulars:

A. Statements of the trading and investment accounts of Orvis were falsely inflated.

B. Statement of correction of customers' fully paid securities loaned and pledged in error was false.

C. Statement of balances in customers' cash accounts were falsely inflated."

The prosecution opened bravely:

> ". . . before acting, Mr. Kilduff, the evidence will show, always went to Sloan, Anderson, Euker and Villani, and they all agreed and acknowledged and promoted what he should do" (Opening, 4/3/75, meh 22).

No such evidence materialized, and so, near the conclusion of Kilduff's examination, the Court said to the prosecutor:

> "I assume also you are going to have some evidence against Mr. Anderson before we get through" (441).
>
> * * * * *
>
> "He certainly knows there is a conspiracy going on. He certainly didn't do anything to stop it. I can't see he did anything very active to push it along" (442).

When the prosecutor said Anderson "certainly promoted the conspiracy," the Court answered:

> "I haven't heard anything about that" (442).

This caused the prosecutor to question whether the prosecution would continue if the case would not get to the jury on Kilduff alone (442-3). The Court answered:

> "I think it probably would. I think you are making an argument that when he went to the general partners, general partners' meetings and sat by and let them tell falsehoods, they probably could infer from that that he agreed to do that, and that would be enough, I assume" (443).

When the prosecutor asked about "Villani on the same basis," the Court would not express an opinion (443), though there was no conceivable legal difference between the two defendants.

After the prosecutor again expressed his primary reliance on Kilduff, the Court said:

> "I would have to let it go to the jury on the theory when Mr. Anderson was a general partner, when he went to general partners' meetings and let the general partners be told things that he knew to be false, I suppose I would have to say that the jury is entitled to infer from that that he had agreed with his associates to do that" (444).

Its direct examination of Kilduff having failed to elicit any of the affirmative conduct by Anderson promised in its opening, the prosecution seized on these comments by the Court and thus began the theory of a conspiracy of silence by inference. Over repeated objection and exception, the prosecution contended that Anderson participated in a conspiracy of silence by inference, by knowing and not "blowing the whistle", a "cover-up"—though no such charge appeared in the indictment and thus should have been precluded by *Grunewald* v. *United States,* 353 U.S. 391 (1957). After various jury questions evidencing its obvious confusion and numerous defense exceptions to the Court's answers to the jury, a modified conspiracy of silence instruction was given, over objection, which permitted the jury to find participation in a conspiratorial agreement by Anderson from his knowledge and silent presence at a meeting. The instructions were erroneous, and, in any case, that there was no evidence to support a conviction on that theory.

In summation the prosecutor said that Kilduff, Euker and Sloan had devised the seven-way scheme (2958-9), but that Anderson and Villani must have known (2946-8) and

promoted the conspiracy (2949, 2959-60) by not "blowing the whistle" (2970, 3002), by "keeping his mouth shut . . . Not once did Carl Anderson get up before the general partners and blow the whistle" (2969-70). He particularly relied on Anderson's silence when new partners—admitted in his absence and through the effort of others—came into Orvis (2969-70), and Anderson "just sat back" (2969), "not saying one word" (2971).

Having erroneously claimed that Anderson promoted the conspiracy by not rejecting new partners' capital, the prosecutor did an about face and argued that Anderson promoted the conspiracy by rejecting Gamelson's capital (2975). How did either the acceptance or rejection of new capital promote a conspiracy to file a false report with the SEC? It did not. Nor did Anderson's conversation with Gamelson and Smith, on which the prosecutor relied as "the best example of all" (2971), further a conspiracy to falsify records in order to fool the SEC (2967, 2970).

The Court's instructions to the jury could not and did not dispel the erroneous belief as to the law of conspiracy which the prosecutor's summation indelibly etched on their minds. Faced with a troublesome conspiracy count which, as the jury put it, "goes all over the place" (App. 127a), the jury repeatedly sought clarification on whether it could infer participation in a conspiracy from the defendant's silence. Defense counsel regularly excepted to the Court's answers.

Referring to the prosecutor's contention that "a conspirator can further the conspiracy by silence", the Court supported the prosecutor by saying: "Well, in a certain limited extent that is true" (App. 88a). There followed a lengthy

illustration about a hypothetical bank teller which posed two examples, neither of which was appropriate, because each presupposed the very issue in question: Was he a member of the conspiracy? The first example began "one member of this conspiracy is a bank teller" (App. 88a); the second example began by referring to a bank teller who "had no part in it" (App. 89a). While the Court said that "before either defendant can be considered guilty of the conspiracy, he has to have been found a deliberate participant in it" (App. 90a), the Court left the jury with the belief instilled by the prosecutor that silence equals participation.

The Court attempted to clarify its prior illustration by telling the jury:

> "There does have to be an agreement for there to be a conspiracy by definition. But you don't have to find that they sat around and said, 'We agree.'
>
> What I mean is you can infer the agreement from what you see them do. The illustration I gave of the common undertaking, where three of you go to lunch and send one of you ahead to make a reservation and order lunch, but there had to be an agreement otherwise you wouldn't know what you were doing. But my failure to use the word 'agreement' doesn't mean that you don't have to find an agreement. It has to be a common undertaking and if you see a common undertaking going forward you can infer, if you wish, that everybody has agreed to do what you see them doing.
>
> All right, then the illustration I gave you about silence. In the illustration of the non-participating, I told you about his brother, and I injected in the thing he may have pleaded with his brother to stop. Well, that was just a kind of flourish I put in. If he hadn't

pleaded with his brother to stop he still would not be guilty. There is no necessity of pleading to stop the conspiracy. I just kind of threw that in. I might have confused you and you might have thought that this second illustration he would have been guilty even if he just failed to use moral suasion with his brother. He didn't have to do anything. He may know all about it and maybe secretly in his heart glad it is happening.

It has nothing to do with it. Unless he participates in it he is not guilty of a conspiracy. So that little flourish I put in was not intended to change the meaning" (App. 113a-114a).

However, this did not cure the error. While the Court said "there does have to be an agreement" and "unless he participates in it he is not guilty", the Court still told the jury it could "infer the agreement" but did not explain how the jury could infer the agreement from silence. As a result, after the jury said that "Count 1 goes all over the place" and asked for it to be simply put (App. 127a), the Court answered:

> " . . . All you have to say is defendant so and so guilty or not guilty of the crime of conspiracy" (App. 128a).

Since this merely restated the question and did not answer it, immediately thereafter the jury asked:

> "In other words, is he or is he not a member of this conspiracy?" (App. 128a).

After further jury questions dealing with knowledge (Ct. Ex. 9; App. 131a), the Court gave additional instructions, to which the defense excepted, saying:

"He must do something affirmative, your Honor. He must take some action evidencing his agreement."

* * * * *

" . . . they must find that the objective of the conspiracy was to file this false report" (App. 132a).

"This false report", the one charged in the substantive count on which Anderson was acquitted, was the only matter in evidence having any connection with the SEC. The Court refused this request (App. 132a) and said only:

> "I have nothing to add except, of course, everything I have said is qualified by everything I have said before, there must be an agreement, everything. I am just answering your question and I wasn't taking away anything of what I said before as to the necessity of agreement, wilfulness, acts, everything.
>
> You asked me just about knowledge, and that's what I answered" (App. 133a).

Based upon the jury's prior two questions, the defense requested an instruction that:

> "Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless you find beyond a reasonable doubt that, (a), it was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC and, (b), it was done by him as part of an illegal agreement with at least one of the other conspirators to make, keep and file false records.
>
> In other words, it is not enough to convict Mr. Anderson if you find only that there was a conspiracy between others with respect to transactions in which

> he did not participate and that Mr. Anderson knowingly caused false records to be made, kept and filed without agreeing with one of the other named conspirators that it be done. That is not enough.
>
> I think it might be helpful that it be a Court Exhibit, too" (App. 135a-136a; Ct. Ex. 10).

The request was denied.

The timeliness, germaneness (App. 136a) and merit of the requested instruction was quickly apparent when the jury asked:

> "Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy?" (App. 136a; Ct. Ex. 11).

Accordingly, defense counsel renewed his prior request for instructions (App. 136a). Although the Court answered the jury's question, saying: "Well, the answer to that question is no" (App. 137a), the Court did not give the requested instruction, but, on the contrary, reverted to the bank teller's illustration and said:

> "Of course activity in the peculiar circumstances that I defined them to you as in relation with that bank teller, the one who was a participant, can be purposeful silence under the peculiar situation as the one I stated" (App. 137a).

When the Court asked whether that answered the question, the jury inquired whether knowledge of the conspiracy and "wilful silence . . . not necessarily a positive act" would suffice (App. 137a-138a). Although the Court replied: "To be an act in furtherance of the conspiracy--silence must be

a planned act" (App. 138a), the Court nowhere related this to Anderson or to an agreement between Anderson and another alleged conspirator (App. 138a-139a).

After taking exception, defense counsel observed:

> "By virtue of the jury's repeated questions on this, it indicates their lack of awareness of what your Honor has sought to tell them" (App. 140a).

The Court's subsequent attempt to clarify conspiracy by silence (App. 141a) was not satisfactory to the defense, which asked for and was refused an instruction that "in the context of this case silence is not enough" (App. 144a). This concluded the day's court session. The instruction should have been given, because there was no evidence of Anderson's agreement to join a conspiracy by remaining silent.

Immediately after the previously quoted discussion the Court adjourned for the day, to resume the following day, April 30th, at 10 a.m. (App. 144a). At 9:45 a.m. defense counsel submitted a proposed instruction to the jury on the issue raised at the conclusion of the prior day's proceedings (App. 150a-151a; Ct. Ex. 12). No instruction was given until 10:30 a.m., when the jury had been deliberating for 30 minutes (App. 145a).

After the Court's further instructions (App. 147a-149a), defense counsel took exception, arguing for an instruction that the jury could not infer a conspiratorial agreement from silence (App. 148a-150a). Defense counsel asked for an instruction that "you may not infer joining a conspiracy by silence. There must be an expressed agreement." The Court disagreed, saying it may be inferred from the act (App. 150a). Defense counsel asked the Court to charge the

omitted portions of his request in Ct. Ex. 12, which the Court said had otherwise been covered (App. 151a). When the jury convicted on the conspiracy count and acquitted on the substantive count, the jury asked whether the Court wanted "any recommendation as to degree of guilty" (App. 157a). The Court did not want it.

While circumstantial evidence—such as a defendant's fingerprints on stolen goods to which he had no pre-theft access—and certain acts—such as the attendance of a 250-pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of a crime of someone useful as a lookout—may warrant of finding of participation in a crime, the mere furnishing of company to a person engaged in crime does not warrant a finding of participation. *United States* v. *Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962).

Anderson had every right to be at whatever general partners' meeting the Court had in mind. No conspiratorial intent sufficient to support a conviction may be found in Anderson's presence at a general partners' meeting of 30 or more people with a public stenographer in attendance, at which Orvis' serious financial problems were aired and no reference whatsoever was made to the SEC.

The gist of a conspiracy is the act of agreement, and it is therefore essential to determine what kind of agreement existed as to Anderson. The scope of Anderson's agreement must be determined individually from what was proved as to him. *United States* v. *Borelli,* 336 F.2d 376, 384, 385 (2d Cir. 1964). There was no proof that Anderson joined a conspiracy to file a false report with the SEC.

It is fundamental that a conviction for conspiracy under 18 U.S.C. §371 cannot be sustained unless there is proof of an agreement to commit an offense against the United States. *Ingram* v. *United States,* 360 U.S. 672, 677-8 (1959), citing *Pereira* v. *United States,* 347 U.S. 1 (1954). An essential ingredient of the proof is knowledge of that federal nexus, without which knowledge the intent cannot exist. *Ingram* v. *United States, supra,* at pp. 678, 680, citing *Direct Sales Co.* v. *United States,* 319 U.S. 703 (1943).

Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. This is because charges of conspiracy are not to be made out by piling inference upon inference, fashioning a dragnet to draw in all substantive crimes. *Ingram* v. *United States, supra,* at p. 680; *Direct Sales Co.* v. *United States, supra,* at p. 711, citing *United States* v. *Falcone,* 311 U.S. 205 (1940).

The conspiracy conviction was obtained on an erroneous theory of law which, in any case, was unsupported by sufficient evidence. There was no evidence, persuasive beyond a reasonable doubt, that Anderson by his silence joined any conspiracy to file a false report with the SEC.

POINT III

On pre-trial motion and at trial the Court erroneously ignored Rule 8c-1, 17 C.F.R. 240-8c-1, holding that any hypothecation of customers' fully paid-for securities was illegal, and over objection admitted substantial evidence of Orvis' hypothecation in the Spring of 1970 as probative of Anderson's wilfulness with respect to Form X-17A-5 in October 1969.

Count 1 of the indictment alleges a conspiracy, *inter alia,* (a) to hypothecate customers' fully paid-for securities in violation of Rule 8c-1, 17 C.F.R. 240.8c-1; and (b) to file a false Form X-17A-5 with the SEC in violation of Rule 17a-5, 17 C.F.R. 240.17a-5. Count 8 alleges the filing of a false Form X-17A-5 on October 16, 1969 in that, *inter alia,* "Statement of the correction of customers' fully paid securities loaned and pledged in error was false." Count 9 alleges the hypothecation of customers' fully paid for securities in violation of 15 U.S.C. §78h and Rule 8c-1, 17 C.F.R. 240.8c-1. Nowhere does the indictment allege the hypothecation of customers' securities "for a sum which exceeds the aggregate indebtedness of all customers" of Orvis. Rule 8c-1(a)(3) (App. 9a-11a, 20a-22a).

Before trial Anderson moved, *inter alia,* to dismiss Count 9 and that part of Count 1 charging a conspiracy to violate 15 U.S.C. §78h and Rule 8c-1 (17 C.F.R. 240.8c-1) promulgated thereunder (App. 35a-63a). The motion was denied without opinion (App. 4a). It was the Court's opinion that any hypothecation of fully paid-for securities was illegal.

During trial Count 9 and that part of the conspiracy count alleging a conspiracy to hypothecate were dismissed

after Kilduff denied discussing hypothecation with Anderson or anyone else at Orvis (417, 1815-17). However, over objection, hypothecation remained an issue under Count 8 (the filing of Form X-17A-5) and Count 1 as submitted to the jury, which alleged a conspiracy to file a Form X-17A-5 on October 16, 1969 which falsely stated, as one of three specifications, that the erroneous hypothecation of customers' fully paid securities had been corrected (980-6, 1101, 1815-18, 2803, 3027-8; App. 82a-83a). The prosecution regarded this as "the crux of the questionnaire [Form X-17-5] . . . the biggest single item" (1096).

Anderson contended that customers' fully paid-for securities could be hypothecated provided the lien did not exceed the aggregate indebtedness of all Orvis' customers. Rejecting this contention, the Court required no proof by the prosecution that the liens secured by the allegedly erroneous hypothecations exceeded the aggregate indebtedness of all Orvis' customers, and the Court precluded Anderson from establishing that Rule 8c-1 was not violated. Thus, the jury was permitted to convict on Count 1 without any proof that the liens secured by the hypothecations at the filing of Form X-17A-5 on October 16, 1969 exceeded the aggregate indebtedness of all Orvis' customers.

15 U.S.C. §78h provides:

> "It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly—
>
> * * * * *
>
> "(c) In contravention of such rules and regulations as the Commission shall prescribe for the protection

of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances . . . (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

Pursuant to its rule-making power, the SEC promulgated Rule 8c-1 (17 C.F.R. 240.8c-1), which reads in pertinent part:

"(a) General Provisions.—No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly, hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances—

* * * * *

"(3) that will permit securities carried for the account of customers to be hypothecated, or subjected to any lien or liens or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts;"

§78h permits the SEC to prescribe rules and regulations dealing with the hypothecation of securities of customers "for a sum in excess of the aggregate indebtedness of such customers in respect of such securities." However, Rule 8c-1(a)(3) forbids the hypothecation of "securities carried for the account of customers . . . for a sum which exceeds

the aggregate indebtedness of all customers in respect of securities carried for their accounts." In this regard, the rule whose violation is made a crime permits hypothecation to a far greater extent than its enabling §78h.*

See also, II Loss, Securities Regulation (2d Ed.) which observes that "Clause (3) of §8(c)** speaks in terms of the aggregate indebtedness of all customers and makes the customer's consent irrelevant," distinguishing it from the more restrictive New York statute which "prohibits the hypothecation of a *particular* customer's securities for more than the amount of the broker's lien on those *particular* securities *unless the customer consents*" (at p. 1200). (Emphasis in original.)

And V Loss (1969 Supp. to Vol. II), substituting a new note 41 to p. 1200 of Vol. II, states that the New York statute "is stricter in that under §8(c)(3)[of the 1934 Act], theoretically, a broker-dealer owed $100,000 in margin accounts by all customers could hypothecate one customer's securities for that sum even though that one customer owed a much lesser amount" (at p. 3204).

In opening the prosecution stressed the hypothecation of customers' paid for securities as the most successful of the seven ways the defendants effected the conspiracy to file a false SEC report. Although there was no relationship of events in 1970 to any SEC filing and the prosecution was ostensibly trying to prove only the alleged falsity of the

---

* See *United States* v. *Schwartz, supra*, at p. 507, par. 10, which, it is respectfully submitted, incorrectly says that the pledge is limited to "the aggregate indebtedness of the customers in respect of such securities."

** Actually, the reference should be to Rule 8(c) and not §8(c).

entries in Def. Ex. BP and Ex. 74, Item 6G, reading: "Pledged in error (since corrected) . . . $5,965,146" and "Loaned in error (since corrected) . . . $1,517,205" (2957), the prosecution's opening, its evidence and its summation stressed hypothecation into late April 1970 amounting to over $10,000,000.

In opening the prosecution said:

> "The seventh and last way, ladies and gentlemen, that this fraud is promoted was the most successful way and the evidence will show the most rewarding way from these defendants' point of view.
>
> "Orvis Bros. in 1969 and '70 took securities that they were holding for customers that were fully paid for, and used the customers' securities as collateral to get bank loans in various banks. These securities, the evidence will show, did not even belong to Orvis Bros.
>
> "What these two defendants agreed to do was this: As the evidence will show, ladies and gentlemen—
>
> Mr. Londin: May the record show that he was pointing at the two defendants on trial so it is crystal clear he said they did it.
>
> "Mr. Feinberg: No, I said these two, Mr. Anderson and Mr. Villani agreed to do the following.
>
> "Mr. Londin: That's what I wanted the record to show, your Honor, he's made it clear.
>
> "Mr. Feinberg: In the Orvis Bros. vault was millions of dollars in stock which belonged to Orvis Bros. customers. Orvis Bros., the evidence will show, kept this stock in their vault for safekeeping. This customer stock was supposed to be segregated from any other stock because it belonged to customers, not to Orvis Bros. In 1969, 1970, faced with these debts and this

financial crisis that I have explained in my opening to you here today to you ladies and gentlemen, these two men, Mr. Anderson and Mr. Villani, along with three other men, which we will get to in a moment, agreed to take these securities from the vault in Orvis Bros. and use them as collateral with banks to get loans totaling by August 31, 1969, seven million dollars.

"This is called, ladies and gentlemen, it is a long word, hypothecation: using fully paid for customers' securities to secure loans for a firm.

* * * * *

"These, ladies and gentlemen, were the seven ways that these two men agreed to hide the red and bleak financial picture of Orvis Bros. from the SEC." (Opening, 4/3/75, meh 15-17).

* * * * *

"Employees who worked in the vault will testify about the use of these customers' securities to get bank loans, and how they questioned Kilduff and Anderson about these acts and were simply told, stay out of it, mind your own business (Opening, 4/3/75, meh 25).

The proof was to the contrary (1089). Aside from having been reported in the Haskins & Sells report, the hypothecation of fully paid for customers' securities was not a subject of discussion at Orvis, and Kilduff never talked to Sloan, Anderson, Villani, or Eucker about hypothecation at Orvis (417). Kilduff having negated any conspiracy involving hypothecation, the prosecution called Lanz, who confirmed that the hypothecations were Eucker's responsibility alone (1127-34, 1144-8). No other co-conspirator was involved. Through Lanz the prosecution established that

Orvis was unable to release about $2,500,000 of customers' securities (1131-4). However, there was no evidence that these remaining pledges violated Rule 8c-1.

In addition, over Anderson's continuing objection, through Soffler the prosecution introduced testimony and documents showing that from August 31, 1969 to mid-October 1969 hypothecation continued (1911-23, 1933). Although Soffler claimed there was an SEC rule against pledging customers securities (1934), Anderson was barred from cross-examining on Rule 8(c)(1) (1937-9).

Over objection, through the testimony and documents of Vayda of Haskins & Sells, the prosecution showed the state of paid for but unsegregated customers' securities in the aborted audit as of May 3, 1970. Vayda said he participated in an audit of Orvis in May 1970 which was not completed (1344-6). Over objection that the May 3, 1970 figures were based on an uncompleted audit, not connected with Anderson, not shown to relate to the securities pledged as of August 31, 1969, and did not show that the August 31, 1969 figures were inaccurate (1346-8, 2442), the Court erroneously received the testimony and exhibits as "relevant on the question of whether the error in '69 was wilful" (1348-50), even though Vayda would not link his testimony or exhibits with Anderson or anyone else (1349). Over objection the prosecution then introduced Gov. Ex. 142, "the draft [audit report] as far as you [Vayda] got." From Gov. Ex. 142 Vayda testified that as of May 3, 1970, $6,532,000 of customers' securities were pledged in error and $1,541,000 of customers' securities were loaned in error (1351).

The prejudicial error was compounded by the testimony of Netelkos. Whereas Vayda's figure was $6,532,000 for

pledged customers' securities, Netelkos (with characteristic hyperbole) said that at the end of April (1980-2) the figures exceeded $10,000,000 (1985-9).* Cross-examination revealed that Orvis' customers owed Orvis over $10,000,000 (2131-2). However, Anderson was barred from showing the hypothecation was proper in view of the indebtedness under Rule 8c-1(a)(3). The Court said it had "nothing to do with the issues" and the prosecution prevailed on its argument that "this is the precise legal argument [previously made]" (2131-4).

Since Netelkos claimed to have discussed hypothecation with Anderson, the severely circumscribed cross-examination of him was prejudicially erroneous. Although Netelkos was himelf under a multi-count indictment in a different federal case for illegal hypothecation shortly before his arrival at Orvis (1933-4, 2000-2, 2012), and although Netelkos persisted in denying his complete control of Orvis in early 1970 when he claimed to have discovered illegal hypothecations there, Anderson was not permitted to show through numerous documents the pervasive control Netelkos had of Orvis' daily business affairs (Exs. BD, BF, BH, BI, BJ, BK, BM—all *id.*), or to inquire into the substance of the pending hypothecation case against him (whose existence was elicited by the prosecution on direct examination)—even though the brokerage firm involved was the vehicle for his involvement with Orvis in Manor Nursing Homes trades and other securities tranactions. Cross-examination as to the details of his admitted complicity in

* In summation the Government conceded that the advent of Netelkos was "five, six months after the audit was filed with the SEC . . . long after everything is done (2989) . . . way long after the crux of the case is over" (2991).

Manor Nursing Homes* was also curtailed; and no cross-examination was permitted concerning sanctions imposed against him by regulatory agencies such as the NASD and the SEC (Ct. Ex. 5-6, 2804-6; 2031-7, 2148).

There was no proof that Anderson was responsible for the hypothecations. Indeed, the proof was to the contrary. There was no proof that in October 1969 Anderson knew the "Pledged in error—since corrected" entry was false. Anderson's knowledge (according to Netelkos alone) in 1970 of hypothecations occurring in 1970 or in 1969 cannot establish the "wilfulness" of any act by Anderson in October 1969, there being no proof whatsoever of any such act.

In summation the prosecution stressed the hypothecation, contending the illegality according to Lanz and Soffler was "never corrected . . . things got worse" (2952-3, 2957-8), and in its charge the Court referred to "the Government's claim that statements of the correction of customers' fully paid securities loaned and pledged in error was false" (App. 95a).

The prejudice of the foregoing errors is emphasized by the jury's questions:

> "If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he thereby have knowledge of the conspiracy?"
>
> * * * * *
>
> "If there are several items in this false report and a defendant knows of one, does he know of the conspiracy?" (App. 129a-131a; Ct. Ex. 9.)

---

* *S.E.C.* v. *Manor Nursing Ctrs. Inc.*, 340 F. Supp. 913 (S.D. N.Y. 1971), *aff'd* in part, *rev'd* in part, 458 F.2d 1032 (2d Cir. 1972).

These questions and the Court's answers (to which exception was taken) (App. 131a-133a) demonstrate that the jury could have convicted only on the hypothecation specification. Accordingly, the conviction must be reversed. *United States* v. *Natelli*, —— F.2d —— (2d Cir. 1975), decided July 28, 1975; Slip Op. p. 5191.*

POINT IV

The Fund of Letters trade was erroneously submitted to the jury in the absence of any evidence that Anderson conspired to include it in Form X-17A-5 under "balances in customers cash accounts", after the prosecution exploited the transaction in order to link Anderson with Vesco.

Anderson had been a director of International Controls Corp. In the summer of 1970 he broke with Vesco and ICC (2535). As the result of a chance meeting in September 1968, and without any participation by Vesco, Anderson effected a cross in unregistered ICC stock between Hoffman and Bull, as sellers, and the Fund of Letters,** as buyer, through a company named Viszcaya (the Goulandris Family) which was to acquire the sellers' unregistered stock and resell to the Fund at a higher price the same amount of Viszcaya's shares which had registration rights (2468 *et seq.*). After almost a year of negotiations the Fund rejected the trade because ICC would not register the stock (507, 505).

---

* On the hypothecation issue, Anderson adopts the brief on behalf of appellant Eucker.

** The Fund of Letters is a public closed-end investment company, now known as New America Fund, which at the time specialized in the purchase of restricted or non-registered securities (1890, 1720-1). It had no connection with Vesco.

The indictment charged the transaction as part of a conspiracy to violate Reg. T.* It was not charged as one of the numerous allegedly false entries in Orvis' records (App. 14a, 19a-20a). Realizing in mid-trial that it was not a Reg. T violation, the prosecution over objection changed its theory, in effect re-wrote the indictment, and charged it as part of the overall conspiracy to file false records with the SEC (2437-41, 3028, App. 83a), in that its dollar total was included in customers' cash accounts rather than customers' partly secured accounts.

Anderson had nothing to do with the way this 1968 transaction was recorded on Orvis' books under customers' cash accounts—where it indeed belonged at the time. There was no testimony that Anderson at any time thereafter, when it became a disputed trade, discussed with anyone the place where the transaction should be recorded. Indeed, the prosecution established that at first Anderson

---

* The Assistant who obtained the indictment resigned the next day. His grand jury interrogation of Dennis J. Duffy (the author of the Goodbody report), on July 31, 1974 (Gov. Ex. 3533 id.) clearly establishes his ignorance of and misadvice to the grand jury concerning Reg. T. At Gov. Ex. 3533 id., pp. 48-50) (the first page of the transcript is numbered p. 39), the prosecutor questioned Duffy about the partially secured customer's accounts with outstanding debits, including Martin, Bozeman and Fund of Leters (p. 48), as follows:

> "Q. Did you have any discussion with anyone concerning these accounts in which there were debit balances regarding possible Reg. T violations? A. No, sir.
>
> "Q. Do you know what a Reg. T is? A. Specifically, no; so you had better tell me.
>
> "Q. You have debit balances in certain accounts, customer accounts, which can be used as good capital for a certain period of time of upwards to thirty days, but thereafter certain balances should not be used in computing a firm's capital position. A. You said debit balance?
>
> "Q. Yes. A. No, I did not know that" (App. 166a).

discussed the transaction with no one at all, and that later the entire firm was aware of it and was after him. On the one occasion Kilduff claimed to have said—in the presence, *inter alia*, of Musil, Villani and Anderson (who all denied it)—that the four problem accounts (Bozeman, Martin, Aquarius and Fund of Letters) were not being charged against capital, Kilduff said: "I don't recall him [Anderson] saying anything at that particular meeting, sir" (209-10). And even then there was no discussion about where on Orvis' books the trade was recorded.

When Haskins & Sells was told of it during the August 1969 audit, they made no change in the accounting treatment except to have Orvis double its reserve for uncollected customers' accounts.* Vayda knew of the four accounts—Fund of Letters, Bozeman, Aquarius, and Martin—and that they were carried as cash accounts, notwithstanding the fact that they "were, as we called it, in deficit, partly secured" (1327). Kilduff told Vayda "this was one of the exposure areas of Orvis Bros." (1328). Orvis' records showed the longstanding debits (492-3).** Haskins & Sells took this into account and, after doubling the reserve, "left them [the four accounts, including Fund of Letters] in 'cash accounts' " (1328), footnoting Item 6-A (*supra*, p. 28).

During the first day's deliberations, at 5:45 p.m. the jury asked:

> "If there was a conspiracy consisting of several parts and a defendant knew of only one part, does he

* One of the Big Eight with decades of experience, Haskins & Sells had about 25 men directly involved in the audit and had been auditing Orvis for 20 years (393-4, 396, 493).

** The Fund trade date was Oct. 24, 1968, with an Oct. 31, 1968 settlement date (1722, Ex. 152).

thereby have knowledge of the conspiracy?" (Ct. Ex. 9; App. 129a).

The Court's answer (App. 129a-131a) did not dispel the confusion, and the jury asked:

> "If there are several items in this false report and a defendant knows of one, does he know of the conspiracy?" (App. 131a).

The Court answered, and defense counsel took exception on the grounds that: there must be an agreement; a defendant "must do some affirmative act . . . must take some action evidencing his agreement"; and that "the objective of the conspiracy was to file this false report [the Haskins & Sells report as of Aug. 31, 1969, filed on Oct. 16, 1969]* (App. 131a-132a).

The Court, after noting an exception to defense counsel (App. 132), heard the prosecution say: "I don't think one more word should be said," and answered the jury's question in a manner which denied the defense requests (App. 132a-133a).

The jury then deliberated from 6:00 p.m. until they retired for dinner at 6:30 p.m. (App. 133a-134a). Because of the jury's two questions (Ct. Ex. 9; App. 129a, 131a), *supra*, asked shortly before the recess (App. 136a), during the dinner recess defense counsel prepared and at the first available opportunity requested the following instructions to the jury:

---

* It was only this overt act, charged in the substantive count on which Anderson was acquitted, which kept Count 1 from being barred by the Statute of Limitations. This defense was raised on Anderson's motion to dismiss the conspiracy count, which the Court denied (App. 3a-4a, 30a-34a, 38a-43a).

"Mr. Londin: Your Honor, I respectfully request the Court instruct the jury as follows:

"One, if you do not believe the testimony of Kilduff, you must acquit Mr. Anderson.

"Two—I, of course, request that both be given, but if your Honor does not want to give both, of course I will be happy with one without waiving my rights to innocence* upon the other.

"The Court: Less unhappy, shall we say.

"Mr. Londin: That is correct, sir.

"Two, you may not convict Mr. Anderson on the basis of the Fund of Letters transaction unless you find beyond a reasonable doubt that, (a), it was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC and, (b), it was done by him as part of an illegal agreement with at least one of the other conspirators to make, keep and file false records.

"In other words, it is not enough to convict Mr. Anderson if you find only that there was a conspiracy between others with respect to transactions in which he did not participate and that Mr. Anderson knowingly caused false records to be made, kept and filed without agreeing with one of the other named conspirators that it be done. That is not enough" (App. 134a-135a; Ct. Ex. 10).

The Court refused the request on the grounds it was not timely and not sufficiently germane (App. 136a). An hour and a half later the jury was back with this question:

* The word "innocence" should read "insist."

> "Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy" (App. 136a; Ct. Ex. 11).

Defense counsel renewed his prior request for instructions (App. 136a). The Court's answer, which repeated its original illustration of the silent bank teller (to which defense counsel had originally taken exception), satisfied neither defense counsel nor the jury, the jury asking about:

> " . . . knowledge of the conspiracy and knowledge of its purpose and wilful silence . . . silence with a purpose, not necessarily a positive act" (App. 137a-140a).

The requested instruction concerning the Fund of Letters trade was never given.

There was no testimony that Anderson conspired to record the Fund of Letters trade under "customers cash accounts" in Form X-17A-5, where it is nowhere listed and is included only as part of a multi-million dollar total. Yet this was one of the three specifications under which the jury was permitted to convict (App. 82a-83a, 129a-131a). Accordingly, the conviction should be reversed. *United States* v. *Natelli, supra,* Slip Op. p. 5191.

Reversal is particularly required because the prosecution exploited the transaction in order unnecessarily and prejudicially to link Anderson with Vesco, which it repeatedly did during the trial in spite of their break five years earlier. The prosecution's first theory was that the trade did not settle in October 1968 and thus violated Reg. T; its second theory was that the Fund's trade should not have been included in the dollar total for customers cash accounts. Of what relevance were the repeated ref-

erences over objection to Vesco? Vesco had nothing to do with the trade and rebuffed Anderson's efforts to have ICC register the stock. It began with the prosecution's opening:

> "Very important, ladies and gentlemen. I have mentioned to you how Fergus Sloan was the major contact with Rick Clinton. This man, ladies and gentlemen, Carl Anderson, was the major contact with Robert Vesco and International Controls Corporation. It was through Mr. Anderson's efforts that Robert Vesco comes into Orvis Bros. and lends Orvis Bros. $500,000.
>
> "The evidence will show, ladies and gentlemen, that Carl Anderson wore two hats: major partner of Orvis Bros., a director sitting on the board of International Controls Corporation.
>
> "The evidence will show that Carl Anderson had every reason in the world to see to it that that trade of ICC stock with the Fund of Letters went through and had every reason to see to it that that account was not closed at Orvis Bros. after seven days.
>
> "The evidence will show that Carl Anderson made attempt after attempt to get that business deal worked out for months and months and months, but all that time that account sits in the books and Carl Anderson even goes out to California with Robert Vesco to try to get that deal closed, but no one else from Orvis Bros. goes out to California with them.
>
> "Two hats, ladies and gentlemen" (Opening, 4/3/75, mch 20-1).

Over objection the prosecution offered exhibits to show Vesco's prior financial interest in Orvis (127-8); Ander-

son unsuccessfully objected to the Fund trade as a means of naming Vesco (135-6); over objection the prosecution repeated Vesco's $500,000 limited partner's capital in Orvis, coupling his name with Mr. & Mrs. Anderson (141); over objection the prosecution elicited testimony that Anderson's major contact (with contributors to Orvis capital) was Vesco and that Anderson was a director of ICC until 1970 (168); the prosecution read from a lengthy exhibit that "Bob Vesco increased his capital with additional value of $230,000" (230), and from another exhibit that Orvis' capital included "Bob Vesco's bank stocks that he brought in" (233).

Thereafter Anderson again objected to the Fund trade as a pretext for dragging Vesco's name into the case (281-5). The Court noted Anderson's standing objection (298), and Kilduff testified that: Anderson made the trade in October 1968 and he first learned of it in May 1969 after which it was discussed at almost all executive committee and general partners' meetings (299-305).

The prosecution continued to mention Vesco—in connection with the Fund (313), as an Anderson source of capital for Orvis (344), and by calling on the defense before the jury to read from Kilduff's NYSE testimony that "Bill Anderson, who was very close with one of the limited partners, Bob Vesco, said he would talk with Vesco about putting up additional capital, perhaps an additional $500,000" (549). After Kilduff, similar testimony was elicited from Tournet (836).

Through Zalduondo's report, Ex. 60, read to the jury, further extensive mention was made of Vesco, over objection that Vesco had nothing to do with the issue being

tried (1540-3), and, in reading from the exhibit, the prosecution filled Vesco's name in for the initials "RV" (1557-60).

When the prosecution called Leavitt of the Fund, Anderson's standing objection to Vesco was noted (1688-9). Leavitt testified about Vesco's presence at a meeting on Jan. 29, 1969 with Anderson concerning registration of the stock by ICC and Vesco's demands (1699-1701)—irrelevant to Reg. T with respect to an Oct. 31, 1968 settlement date (1722, Ex. 152) and to Form X-17A-5 filed October 16, 1969 (Ex. BP).

It continued with Mezzetta's testimony over continuing objection (1760) about his negative research report on ICC about which Anderson was silent (1761-4), and Anderson's subsequent request that Vesco be shown a copy to verify the information (1775-6). Vesco got a copy from Mezzetta and told Mezzetta he would sue. Within an hour Anderson told Mezzetta not to release the report unless it contained Vesco's changes. Mezzetta did not issue it (1776-7). This had nothing to do with the Fund account. It was offered for its improperly prejudicial effect, and it succeeded.

Again Anderson unsuccessfully objected (1818-19). Again Mezzetta testified, indicating his ignorance of the facts about the Fund trade, but still linking Anderson with Vesco (1838-40). And again Anderson objected, arguing that the Fund trade was part of the indictment's Reg. T allegation only. The Court agreed that was the intention of the indictment's draftsman, but felt the conspiracy count was broad enough to support a theory of false filing with the SEC (2334-5, 2437-41).

After Anderson showed the Fund (Leavitt) was prepared to honor the trade if Vizcaya "will make a [regis-

tration] request prior to December 31, 1969" (2504-8; Ex. BU), cross-examining Anderson, the prosecution asked about the numerous companies, including ICC, of which he had been a director. The prosecution stressed that Anderson was a director of ICC, ignoring his connection with the other companies, and over continuing objection established he had been on the ICC board since the beginning of 1966, when he had been asked to join the board by Vesco (2670-2). After the prosecution asked about ICC's non-existent capital contribution to Orvis, the prosecutor again got in that Vesco was a capital contributor to Orvis—over the usual futile objection (2674-5).

As part of his Rule 29 motion, Anderson again repeated and was deemed by the Court to have repeated his objection to the Fund transaction (2759). Since the Court allowed the jury to convict upon this specification, the conviction must be reversed. *United States* v. *Natelli, supra,* Slip Op. p. 5191.

POINT V

The Due Process clause was violated by the 5-year pre-indictment delay and the prosecution's wilful failure to call before the grand jury an attorney who directly contradicted the witness without whom it concededly had no case before the grand jury and at trial.

The lengthy pre-indictment delay deprived Anderson of his Fifth Amendment right to Due Process. According to the indictment, filed on Sept. 10, 1974, the conspiracy began on Sept. 1, 1968. The overt acts were concentrated in the Spring and Summer of 1969 (outside the period of limitations). Although the Oct. 16, 1969 filing, the only overt act submitted to the jury, satisfied the statute of limitations by one month, the indictment should be dismissed because of the inexcusable and prejudicial pre-indictment delay.

There was simply no reason for the lengthy delay. By the Summer of 1970 Orvis, to the S.E.C.'s knowledge, was in liquidation and had sought aid from the NYSE special fund. Anderson testified before the NYSE on Oct. 23, 1970 and before the SEC on Sept. 22, 1971 and Oct. 1, 1971. According to the voluminous and numerous transcripts of SEC interrogations of witnesses and prospective defendants in this case, most interrogations were completed in 1971, and the remainder were completed by mid-1972. Even Vesco was interrogated on April 18, 1972 (App. 190a-191a). The case was referred to the Justice Department about 1½ to 2 years before Kilduff's grand jury testimony (623-5).

Nevertheless, the case languished in the U.S. Attorney's office until its presentation to the grand jury began around mid-July 1974, with an indictment being filed on Sept. 10, 1974, at or about the very day the Assistant in charge resigned, when Counts 2 through 7 were already statute-barred and only the prolix conspiracy count could save its otherwise statute-barred components (App. 191a).

Prejudice was shown by the trial. A hotly-contested issue involved the date of a meeting at which Kilduff said he showed the Executive Committee (including Eucker, Villani and Anderson) Ex. 26, an estimated (543-7) capital computation of 30:1. Kilduff would not be pinned down to a reasonably precise date, placing it during the second or third week of April 1969 (191-7), and, at other times during cross, on or about April 22 (779-80), and finally, saying he was speculating and could not pick a date (586-7, 777-8). Kilduff said the matter was discussed at that meeting by Villani—who denied it (2742, 2751-2)—and by Eucker and Anderson, among others. The discussion involved reducing charges and obtaining more capital (206-7; *supra*, pp. 8-11).

The date was crucial on the question of Anderson's presence. Ex. 26 showed a $27 price for Clinton Oil (531), and the Government gave Kilduff a document showing Clinton Oil sold at $27 on April 22, not before (535-6, 538-9, 562-3; Ex. K). Taken through Ex. K, Kilduff agreed it was unlikely he got the $27 price on April 21st and only remotely possible he got it before (574-6, 779-80). Since it was not before April 22 that Kilduff got the $27 price, Ex. 26 was not prepared before that date, but Kilduff could not say when it was prepared (820).

Kilduff said he discussed Ex. 26 with Eucker (543, 547-8) after preparing it and before going to the meeting (562), and that he again discussed it with Eucker between April 22nd and April 24th (568-9). In fact, shown Ex. 11, Kilduff agreed that Eucker with his family went on vacation to India the week of April 21, a Monday, and was away for several weeks (569, 606-8, 2412-13). His last business day before departing was Friday, April 18; he was home over the week-end, April 19-20; he was at JFK all day April 21; left JFK for India on April 22; and he returned with his wife and four children on May 1 (606-8, 2412-13).

In May, Anderson was not in the office (576). He was in Europe from April 30 to June 6 (2426). If Kilduff in fact discussed Ex. 26 with Eucker, it had to be in May 1969 when Anderson was away. Yet this crucial issue may have been decided against Anderson on Kilduff's faulty memory of an alleged event occurring six years before his trial testimony.

Several times Kilduff said perhaps it was the second or third week in April; on other occasions he picked a period between April 15 and 22, then April 15 and 20 (159, 191-4, 197, 199, 204-5, 272). Finally, he said he really didn't recall and if he had to pick a date, he would be speculating (586-7); that he did not recall what was said at the April 15 meeting (756-8); and that no matter how hard he tried, he could not say exactly when the Ex. 26 meeting occurred (777-8). The $27 price on Ex. 26 indicated it was unlikely that it was before April 22 (779-80)—by which time Eucker was out of the office, flying to India, and not to return until May 1 (569-70, 606-8, 2412-13; Ex. 11, p. 3, item 8). Kilduff said it was impossible to date Ex. 26 precisely (820).

And Anderson, who was frequently away from the office (578)—about two-thirds of the time (2420-1)—was prevented by the five-year delay from producing witnesses to account for his whereabouts during April 15-22, when Kilduff frequently insisted the meeting occurred (*supra*, e.g., 529-30). He had only his diary, BX id., which was given to the prosecution for overnight examination (2761), to show that on April 17 he was in Chicago and stayed overnight, on April 18, (Friday) he was at an underwriting meeting a good part of the day, and on April 21 (Monday) he was in Kansas City (2567-9).

Zalduondo, an elderly Orvis partner, was precise on direct but vague on defense cross. He testified about an alleged conversation with a tearful Anderson at a general partners meeting on the afternoon of June 19 (1533-4) the minutes of which, Ex. 19, show Anderson was absent. On June 19, Anderson's records showed, he spent the day at two board meetings in New Jersey (2537-7).

Mezzetta, another Orvis partner, attacked Anderson on direct but was so vague on cross that the Court curtailed cross and observed he remembered nothing (1876-8). The lengthy delay prevented effective cross-examination of his adverse direct testimony.

And there was Vesco who in 1972 was amenable to subpoena and testified before the SEC in its investigation of this case. Because of the delay, not only was his testimony unavailable, but the prosecution was able to exploit his very name to prejudice Anderson.

Also, the prosecution used the delay to dull the immediacy of Peter Schmidt's testimony. Although aware of the exculpatory testimony he would give (*infra*), deliber-

ately and for its own advantage (avoiding an attack on Kilduff's credibility, thus assuring an indictment and conviction), the prosecution failed to call him as a grand jury witness in its long-delayed investigation, thus combining delay with the pursuit of a prosecutorial advantage. This precluded an earlier written record of his sworn testimony favorable to Anderson, enabling the prosecution to dispute its weight in summation by contrasting it with Kilduff's much earlier-recorded testimony (NYSE in April 1971 and the grand jury in July, 1974). Characterizing it as "a very minor difference" because of the passage of time, the prosecutor said:

> "Who really knows exactly what was said in that crying sob scene in Schmidt's offiec five years ago or, excuse me, not five, three* years ago? Who can really say exactly what was said?" (2985).

In March 1971 (when the NYSE was preparing a multimillion dollar action against Orvis and its partners) Kilduff testified before the NYSE three times (2454). Peter Schmidt was his attorney (2447-50).** Kilduff found Mr. Schmidt an honorable man and had no reason to doubt his integrity or veracity (616). Kilduff exculpated Anderson. After being threatened by the NYSE with prosecution by the SEC, the U. S. Attorney and the District Attorney unless he implicated others, and being offered leniency if he did implicate others, Kilduff inculpated Anderson to save his skin and was stuck with the story when subsequently called by the U. S. Attorney and grand jury.

* Actually, the event occurred on March 18, 1971—four years before Mr. Schmidt's testimony.

** Mr. Schmidt would not testify until the Court informed him that Kilduff had waived the attorney-client privilege by his prior testimony at trial (2446-7).

Mr. Schmidt testified about events at the end of the second and third sessions. At the end of the second session on March 16, 1971, in Kilduff's presence, Levine of the NYSE said:

> " . . . he [Levine] was sure that others had participated in this wrongdoing, and that they would go easy on Mr. Kilduff if he would tell what the others had done, otherwise, it would be very difficult for Mr. Kilduff" (2456).
>
> * * * * *
>
> "Two days later on March 18, at the close of a rather abbreviated session, again Mr. Levine spoke to me and Mr. Kilduff and in Mr. Kilduff's presence and indicated that he had very serious questions about Mr. Kilduff's credibility. He said that it was not possible that Mr. Kilduff had committed these acts by himself, he warned us that the investigation was quite serious and that in addition to the Stock Exchange investigation, the U. S. Attorney and the District Attorney might get involved, that unless Mr. Kilduff was willing to indicate the extent to which the other people had been involved, it would be very difficult for him and that he, Levine, just did not believe, it was just not possible that Kilduff had committed these acts by himself.
>
> "Q. Did he say anything about what would happen to Mr. Kilduff if he did or did not do certain things? A. To the best of my recollection, sir, he just basically said that things would be a lot easier for Mr. Kilduff if he involved the others and it would be very difficult for Mr. Kilduff if he did not" (2457).

* * * * *

"He [Kilduff] said well, I will tell the truth but they won't believe me. He said, you heard what that guy said. They won't believe me if I tell the truth because I did it and I did it alone and he said, I want you to tell them that, I want you to tell Fergus and Bill that I did it, I did it because I tried to save the firm, I was sure that if we had some more time our net capital problems would have been solved, he said—he said they were too dumb to understand the net capital rules, that only he understood what they meant and how they worked, and that he had tried to phony up the records that were supplied to the Stock Exchange in order to save this firm and save his job, and that they didn't know about this and they didn't participate in it.

"That is the substance of what he said" (2460-1).

Cross-examination of Mr. Schmidt by the prosecution is quoted in full:

> "Q. Mr. Schmidt, I take it during this entire conversation with Mr. Kilduff on this last day, the lunch and during this entire period that Mr. Kilduff was very upset and very emotional, is that a fair characterization? A. He was upset, embarrassed and emotional, I would say, yes" (2464).

The following day the Court recalled Mr. Schmidt in the absence of the jury, because it had a problem on a very crucial issue, whether Kilduff had made false statements against the defendants at the New York Stock Exchange to save his own neck and was thereafter stuck with the story when he was called by the U. S. Attorney's office

(2604-5). Mr. Schmidt again testified that the NYSE attorney who questioned Kilduff had threatened Kilduff in his presence:

> "At the conclusion of the third day's testimony when that document was presented and I requested the adjournment and I first talked to Mr. Kilduff and I told him that we could not represent him, I felt we should go back and talk to my partner, it is at that point that Levine, the Stock Exchange man, came back in the room and said that he had very serious questions about Kilduff's credibility, that, in effect, he did not believe that Kilduff did this alone and that he was making it more difficult on himself because there were other people involved—" (2607).

* * * * *

> "A. All right. That is when he said we know Mr. Kilduff is lying. We have very damaging evidence on Mr. Kilduff. We know he participated with others and we are going to prove it and you better advise your client that he is hurting himself. That was off the record, but I believe it was at the start of the second day's testimony.
>
> "Q. Was that in Mr. Kilduff's presence? A. Yes, sir" (2608).

* * * * *

> "A. There is a very big difference, your Honor. At the beginning of the second day's testimony it is my recollection that what they said to him in effect was 'We know you are lying, we have very damaging evidence on you, and we know you participated with others.'

"On the third day, after they presented this document, which was in his handwriting, because they kept asking him 'Did you ever prepare a document in your own writing that showed a net capital ratio of greater than 20:1,' he kept saying no, no, no, throughout three days of testimony. When they finally presented one that was in his handwriting, and I recognized it as his handwriting, I knew that he had been lying, and I asked for the adjournment, I talked with Tom privately.

"Then Levine came back in, and that is when he said in effect that they wouldn't believe him if he said he did it alone, that there were others involved, and, in addition, that there was going to be investigations by the SEC and the U.S. Attorney, and there is no question, your Honor, at that time and in his presence they specifically indicated that if he said he did it alone that they wouldn't believe it" (2612).

* * * * *

"A. Oh, what they did say, they said, 'We don't believe you did it alone, and if you persist in that you are only going to make it more difficult for yourself, and if you do involve the others, you will make it easier on yourself,' and that is as close as I can remember the actual words that were used.

"Q. The proper interpretation of that is you don't get indicted for perjury if you tell the truth? A. Your Honor, believe me, I am not trying to give an implication to what was said. That is for the jury to decide. I don't know. I took it, if you would like to know my opinion, I fully took it as a threat to Kilduff that, if—

"Q. If he lied he would get indicted for perjury. A. Maybe that is the proper interpretation, your

Honor. I didn't take it as such at that time. This certainly wasn't my understanding. In fact, it wasn't Kilduff's because one of the things he said to me back in my office was clearly, he said—when I said go home and talk to your wife and tell her the truth, he says, but nobody will believe the truth. You heard what they said. He knew the same interpretation that I had taken from it. Whether that was a correct interpretation, I am not a trial lawyer, your Honor, and I was doing a favor for a friend. I don't know whether Levine was talking about perjury or the other thing. I clearly assumed that he was implying that in effect a deal type thing. 'If you involve the others, we will go easy on you.'

"I don't think he was talking about perjury.

"Mr. Londin: Your Honor, may I tell the Court that that was the Stock Exchange hearing, it was not under oath, those proceedings. I don't think perjury enters into it at all" (2613-14).

The testimony of Mr. Schmidt as to threats made by Levine to Kilduff was unrebutted. Just as the Assistant who belatedly presented the case to the grand jury failed to call Mr. Schmidt, so the prosecution at trial failed to call Levine although it knew he was still employed by the NYSE (App. 196a). Anderson had witnesses and documents prepared for surrebuttal to establish Levine's similar threats to other Orvis partners, in addition to his threat "to nail Sloan" and to the dispute between Levine and Sloan's attorney (Mr. Tolan of Olwine, Connelly) as to Levine's veracity (App. 196a, 199a-204a).

Relying heavily on the long unjustifiable delay that was solely the Government's responsibility, in summation the prosecutor exploited Anderson's prejudice by denigrating the defense for "nit-picking" when it cross-examined prosecution witnesses as to their memories of crucial dates and events "five, six, seven years ago" (2948, 2981-2).

About Zalduondo, he said:

> "He is getting old. He doesn't remember things the way he might have used to remember them" (2995).

About Schmidt and Kilduff, the prosecutor said:

> "Who really knows exactly what was said five years ago . . ." (2985)

About Mezzetta, the Court observed in curtailing cross-examination:

> "The man doesn't remember anything." (1876-8).

Throughout his direct and cross-examinations Kilduff relied on a simple acronym to list those present at executive committee meetings when he claims improprieties were discussed—SAVE, for Sloan, Anderson, Villani and Eucker. When asked if others were present, he invariably said, "There could have been," thus precluding any direct attack on his credibility by Zalduondo, Mazzetta, and Musil —all of whom denied hearing what Kilduff claims to have said at any of the meetings they attended.

About Anderson's inability to corroborate his whereabouts on specific days in 1969, the prosecutor said:

> "You can attack Thomas Kilduff's recollection as you want. Mr. Anderson can take the witness stand until

he is blue in the face and say on September 16 in Chicago, August 2, Denver, November 5, Kansas. *Who says? Carl Anderson says, that's all. No one else says so.* Carl Anderson flips through his diary and says here I was in Cincinnati. Here I was in New York. *Who says so except Carl Anderson*" (2983-4). (Emphasis added).

And that is just the point. After so many years, who but the defendant is available? Should he be expected to span a continent and over half a decade to produce witnesses? The delay was purposeful; the substantial prejudice was exploited at trial by the prosecution. Anderson was denied his Fifth Amendment right to Due Process. The indictment should be dismissed. *United States* v. *Marion*, 404 U.S. 307 (1972).

In *Marion* "the Government concede[d] that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in [that] case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion, supra,* at p. 324.

Whether the delay was "an intentional device" necessitates inquiry into the state of the prosecution's collective mind. "The state of a man's mind," said Bowen, L.J. in *Edginton* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 483, "is as much a fact as the state of his digestion." The intent may be seen in the failure to call Mr. Schmidt before the grand jury and in what the prosecution did at trial to exploit the delay.

However, even if the Court is persuaded of the Government's *bona fides* when it seeks to explain the delay, dismissal of the indictment is still required. In *Marion* the Court left open the "delicate judgment" as to "when and in what circumstances actual prejudice resulting from preaccusation delays requires dismissal." *Supra,* at pp. 324-5. Where, as here, most of the events in issue are now over-six years old, and the indictment was unjustifiably delayed until one month before the statute of limitations ran on the only overt act presented to the jury, and the prosecution forcefully exploited the delay in summation (faulty memories and Anderson's failure to produce additional witnesses from distant places), no "delicate judgment" is required. The violation of Due Process is clear.

The evidentiary record demonstrates that memory lapses attributable to the time delay between the offense and the trial made suspect the reliability of the proceedings for the purpose of determining guilt. *United States* v. *Schwartz, supra,* at p. 504; *United States* v. *Feinberg,* 383 F.2d 60, 66 (2d Cir. 1967), *cert. den.,* 389 U.S. 1044 (1968).

Anderson was also denied his Fifth Amendment rights to indictment by a grand jury and to Due Process when the prosecution failed to call Peter Schmidt as a witness before the grand jury. It is apparent from Kilduff's interrogation before the grand jury on July 18, 1974 (Gov. Ex. 3501 id., p. 40) that the Assistant had also heard of Kilduff's statements to Peter Schmidt* (App. 193a-194a).

* "Q. Did you have any discussion with Peter Schmidt either back at his office, en route to his office or at a lunch that you had with him and Tom Shaw thereafter with respect to any of the facts of what took place at Orvis Brothers? A. That was the first time that either Peter Schmidt or his associate, Tom Shaw,

(footnote continued on following page)

According to the prosecution:

"... Mr. Kilduff effectively made this case. Without his testimony there would have been no indictment and there certainly would not have been any case here at all." (Sentencing minutes, June 16, 1975, p. 29.)

(footnote continued from preceding page)
became aware that there were any falsification of figures, as best as I know.

"As Peter Schmidt and I left the New York Stock Exchange, there was an obvious lack of conversation between us. We walked the six or eight blocks, whatever it was, back to their offices, and we came to the reception room of Breed, Abbott, there was an anteroom or waiting room adjacent to it.

"Peter asked me to wait in there while he spoke to Tom Shaw.

"About ten or fifteen minutes later both he and Tom Shaw returned to me. I recall waiting in that room because it was I guess the very first time that I was alone just after the realization of the impact of the entire situation, and I was quite emotionally upset.

"As Peter Schmidt and Tom Shaw walked in again, Tom Shaw, as I remember, kind of put his arm on my shoulder, tried to calm me down somewhat and said something to the effect that it is not the end of the world, along those lines.

"And the three of us then went upstairs in the same building, to a lunch club and had lunch.

"I recall again that we were sitting in the middle of the room and again I became rather emotional, and again realizing the full impact that I was going to have to go home and relate this to my family, et cetera.

"My thoughts at that time, I am sure, were rather selfish insofar as I was very much concerned about my own welfare, welfare of my family, things of that nature.

* * * * *

"Q. Did you tell Peter Schmidt on that day, either during the course of your walk back to his office, or during the course of the luncheon, that you, in fact, had been responsible for the falsifications of the firm's books and records but that none of the other members of the Executive Committee were aware of what you had done and that you had done that out of a desire to save the firm? A. No. I knew, for instance, who else knew and was involved and whatnot in the months that we had gone through various transactions.

(footnote continued on following page)

Accordingly, the Assistant had a duty to call Mr. Schmidt before the grand jury.* The Assistant could have secured Mr. Schmidt's testimony by having Kilduff, his own witness, expressly waive the attorney-client privilege. When the Assistant called Mr. Schmidt during the grand jury investigation, he told the Assistant he would testify upon receipt of an explicit waiver of the attorney-client privilege. Mr. Schmidt never received that waiver, but only an equivocal letter** from Kilduff's new attorney in which there was no explicit waiver by Kilduff of the attorney-client privilege. Mr. Schmidt told the Assistant it was not a sufficient waiver, but that if he were called he would seek a judicial ruling. No new letter was ever forthcoming, and Mr. Schmidt was never called as a witness before the grand jury*** (2624-5; App. 234a-235a).

(footnote continued from preceding page)

"I was fully aware that other members of the Executive Committee were fully aware of the various things that were spoke about today, so there would be no logic in my saying that to Peter Schmidt.

* * * * *

"But, no, I didn't tell Tom Shaw and/or Peter Schmidt that I was solely responsible for it. I might well have—I might well have spoken of the fact that we did this, or that why did I do that, or things of that nature. But in no way did I try to eliminate other members of the Executive Committee from the knowledge that they had."

* Schmidt had been the attorney for Orvis. Before the NYSE he represented only Kilduff. Anderson was represented by Mr. James V. Hallisey. Sloan was represented by Olwine, Connelly. Eucker was not represented by counsel.

** Copy, annexed to Rule 29 motion, is part of Appendix App. 198a).

*** "Q. Did you have some discussion about this conversation back around the time of the indictment with Mr. Higgins, at the time Mr. Higgins was— A. Oh, yes.

"Q. Would you tell the Court about what happened?

(footnote continued on following page)

The teaching of *United States* v. *Calandra,* 414 U.S. 338 (1974) is that: A federal prosecution for serious crimes can only be instituted by a grand jury. The grand jury's responsibilities include the protection against unfounded criminal prosecutions. The scope of its powers reflects its special role in insuring fair and effective law enforcement, and it must determine whether criminal proceedings should be instituted against any person. When the grand jury is performing its investigatory function, society's interest is best served by a thorough and extensive investigation. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed (at pp. 343-4). See also *United States* v. *Stone,* 429 F.2d 138 (2d Cir. 1970).

(footnote continued from preceding page)

"The Court: Who is Mr. Higgins?

"Mr. Londin: He was the Assistant United States Attorney who presented the case to the grand jury.

"A. Mr. Higgins called me up and said, 'I understand you had a conversation with Kilduff a long time ago,' and I said, 'Yes.'

"He said, 'Would you tell me about it?'

"I said, 'No.'

"He said, 'Why not?'

"I said, 'Because of this privilege thing.'

"He said, 'I will get Kilduff's attorney to write you a letter confirming that Kilduff has waived the privilege as to that conversation.'

"I then got a letter from Butowsky which was very vague. It said something like, 'I understand that Mr. Kilduff has testified about certain conversations with you and to the extent that is true the privilege is waived.'

"So Higgins called me back and said, 'Will you testify now?'

"I said, 'No, I don't feel this lever [letter] is adequate and I will not testify,' but I said, 'If you call me down, I will ask the judge to rule on it.'

"He said he would get back to me, and I don't believe—I may have talked to him one more time after that briefly, but he never got back to me after that.

"Q. He never got back to you or sought a ruling on the question of privilege, is that correct? A. That is correct." (2624-5)

If the foregoing is to be given meaning, an indictment based on the testimony of one co-conspirator witness may not stand, where there was a wilful failure to inform the grand jury of exculpatory evidence going to the credibility of that one witness on the essence of the case. See: *People* v. *Dumas*, 51 Misc. 2d 929, 274 N.Y.S.2d 764 (Sup. Ct. St. Law. Co. 1966); *People* v. *Seward,* 51 Misc. 2d 415, 273 N.Y.S.2d 306 (Co. Ct. Rock. Co. 1966); *People* v. *Lazar,* 51 Misc. 2d 233, 272 N.Y.S.2d 898 (Sup. Ct. N.Y. Co. 1966); *People* v. *Rosen,* 74 N.Y.S.2d 624 (Kings Co. Ct. 1947), not officially reported; *People* v. *Santoro,* 63 N.Y.S.2d 615 (Kings Co. Ct. 1946), not officially reported.

CONCLUSION

Anderson was illegally sentenced after conviction on insufficient evidence caused by prejudicial errors at trial on an indictment obtained in violation of due process. The conviction should be reversed and the indictment dismissed. See, e.g., *Yates* v. *United States,* 354 U.S. 298 (1957); *United States* v. *Jacobson,* 325 F.2d 409 (2d Cir. 1963), *affirmed,* 380 U.S. 246 (1965); *United States* v. *Silverman,* 248 F.2d 671, 686-687 (2d Cir. 1957), *cert. denied,* 355 U.S. 942 (1958).

Respectfully submitted,

Carro, Spanbock, Londin, Rodman & Fass
10 East 40th Street
New York, New York 10016
Attorneys for Defendant-Appellant
Carl W. Anderson

Jerome J. Londin
Kenneth A. Lapatine
Of Counsel

T.W. (2) copies of the within
this 27th day of August 1975

John M. Gordan, III
per M. Rothenberg, Secy
8/27/75

Copies delivered to:

Hanley S. Arkin, Esq
300 Madison Ave
New York, N.Y.

and

Roy M. Cohen, Esq
Saxe, Bacon, Bolan & Manley
39 E. 68th St
New York, N.Y.